Supreme Court, U.S.
FILED

01 1224 FEB 6 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT;

Petitioner,

vs.

UNITED STATES OF AMERICA AND
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
Attorneys for Petitioners
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

A. Does the Ninth Circuit's decision effectively depart from and thus conflict with this Court's decision in *Nevada v. United States*, 463 U.S. 110 (1983)? Specifically, the Ninth Circuit's failure to recognize the United States' initiation of water rights in 1902 for purposes of applying Nevada's forfeiture statute effectively undermined the water rights adjudication embodied in the Orr Ditch Decree (D.Nev. 1944), the finality and enforceability of which was upheld by this Court in *Nevada v. United States*, supra.

B. Does the Ninth Circuit's failure to adhere to Nevada Supreme Court precedent and Nevada's statutory provisions regarding water rights impinge upon the sovereignty of that State and violate the express provisions of the Reclamation Act of 1902 which provide that state law controls within federal reclamation projects?

C. Did the Ninth Circuit err by requiring an investment by a successor-in-interest when it applied the investment backed expectations doctrine to the facts of this case, thereby eradicating established Nevada state water law regarding initiation of a water right and the relation back doctrine?

D. Does the Ninth Circuit Ruling effectively redefine fundamental principles of water law in the Western United States promulgated by a century of State and Federal decisions recognizing state law in the context of the implementation of the Reclamation Act of 1902?

PARTIES TO THE PROCEEDING

Parties to the proceedings in the Ninth Circuit Court of Appeals include the United States of America, Pyramid Lake Paiute Tribe of Indians, the Town of Fernley, the Nevada State Engineer, and the Truckee-Carson Irrigation District. The Orr Water Ditch Company and other water right owners are named parties to the underlying litigation, but are not parties to the present action for the enforcement of the Orr Ditch Decree.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. i

PARTIES TO THE PROCEEDINGS. ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES. v

OPINIONS BELOW. 1

JURISDICTION. 1

STATUTORY PROVISIONS. 2

STATEMENT OF THE CASE. 3

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI. 7

I. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE THE UNITED STATES' INITIATION OF WATER RIGHTS IN 1902 FOR PURPOSES OF DETERMINING THE APPLICABILITY OF NEVADA'S FORFEITURE STATUTE EFFECTIVELY INVALIDATES THE ORR DITCH DECREE AND

REVERSES THIS COURT'S HOLDING IN *NEVADA V. UNITED STATES*.. 7

II. THE NINTH CIRCUIT'S FAILURE TO ADHERE TO NEVADA SUPREME COURT PRECEDENT AND NEVADA'S STATUTORY PROVISIONS REGARDING THE INITIATION OF WATER RIGHTS IMPINGES UPON THE SOVEREIGNTY OF THAT STATE AND VIOLATES THE EXPRESS PROVISIONS OF THE RECLAMATION ACT OF 1902.. 11

A. The Reclamation Act of 1902 is clear: state law controls on issues relating to the appropriation, use, and distribution of water within federal reclamation projects. 11

B. There is no state law support for the Ninth Circuit's position that a second "initiation" of a water right before March 22, 1913 is required for project water users to avoid application of Nevada's forfeiture statute.. 12

C. The Ninth Circuit incorrectly interposed its opinion of the way water rights should be determined and administered in the state of Nevada when it decided this case.. 15

CONCLUSION. 21

APPENDIX (Filed herewith)

TABLE OF AUTHORITIES

Cases

California v. United States, 438 U.S. 645, 654 (1978). 12

In re Manse Spring, 108 P.2d 311, 315-316 (Nev. 1940). 13, 15

Nevada v. United States, 463 U.S. 110 (1983). 3, 4, 6, 7, 9, 10, 14, 21

Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 543-544 (1869) .14

Palazzolo v. Rhode Island, 533 U.S. 606 (2001). 21

United States v. Orr Water Ditch Company, 256 F.3d 925 (9th Cir. 2000) 1, 10, 15, 18, 19, 20

United States v. Alpine Land & Reservoir Co., 508 F. Supp. 877 (D. Nev. 1980) 16

United States v. Alpine Land & Reservoir Co., 983 F.2d 1487 (9th Cir. 1993) 17, 18

United States v. Alpine Land & Reservoir Co., 27 F.Supp.2d 1230 (1998) 18

Statutes

Reclamation Act of 1902, 43 U.S.C. § 383 . . . . . 2, 12

28 U.S.C. Sec. 1291 (1994). 1

Statutes

28 U.S.C. Sec. 1254(1). 2
Nevada Revised Statute § 533.060 . . . . . 4, 20
Nevada Revised Statute § 533.085 . . . . . 2, 6, 13, 15, 18
Nevada Revised Statute § 533.324 . . . . . 13, 14
Nevada Revised Statute § 533.335 19

OPINIONS BELOW

This case originated in the Office of the State Engineer of the State of Nevada with the Ruling *In the Matter of Protested Application 56226, Filed to Change the Manner and Place of Use for the Waters of the Truckee River Heretofore Decreed in the Orr Ditch Decree, Stroey County, Nevada*, Ruling #4116 (hereinafter the "State Engineer's Ruling #4116"). The State Engineer's Ruling #4116 is reproduced in the Appendix hereto at C-1. The United States and the Pyramid Lake Paiute Tribe of Indians (hereinafter "PLIT") appealed the State Engineer's Ruling #4116 to the United States District Court, District of Nevada. The opinion of the District Court is found in the Appendix at B-1. That decision, in turn, was appealed to the Ninth Circuit Court of Appeals also by the United States of America and PLIT. The original opinion of the Ninth Circuit Court of Appeals is reported as *United States v. Orr Water Ditch Company*, 256 F.3d 925 (9th Cir. 2000) (Justice Noonan dissenting) and is reproduced herein the Appendix at A-1. The Order of the Ninth Circuit Court of Appeals denying the Petition for Panel Rehearing and Rehearing *En Banc* also is reproduced in the Appendix at D-1.

JURISDICTION

The District Court reviewed State Engineer's Ruling #4116 pursuant to its continuing jurisdiction over the Orr Ditch Litigation. *See United States of America v. Orr Water Ditch Co., et al..*, In Equity Docket No. A-3 (D. Nev. 1944). On July 5, 2001, the Ninth Circuit Court of Appeals reversed the decision of the United States District Court for the District of Nevada. Jurisdiction in the Court of Appeals was based on 28 U.S.C. Sec. 1291 (1994). On November 8, 2001, the Court of Appeals denied the timely Petition for Panel

Rehearing and Rehearing *En Banc* filed by the Truckee-Carson Irrigation District (hereinafter "TCID"). Pursuant to Supreme Court Rule 13, this Petition for Writ of Certiorari is filed within ninety (90) days of that Order. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

The statutes at issue include Section 8 of Reclamation Act of 1902, 43 U.S.C. § 383, which states as follows:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

The above also is reproduced in the Appendix at E-1. Also at issue is Nevada Revised Statutes ("NRS") § 533.085, found in the Appendix at G-1, which states, in pertinent part:

> Nothing contained in this chapter [including provisions regarding the forfeiture of water rights] shall impair the vested right of any person to the use

> of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Additional statutory authority relevant to this Petition is reproduced in the Appendix at F-1, H-1 and I-1.

STATEMENT OF THE CASE

The history of this litigation dates back to 1913 with the initiation of a lawsuit by the United States to quiet title to all water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation ("PLIT") and the Newlands Reclamation Project, both located in western Nevada. That litigation, termed the Orr Ditch Litigation, was resolved by way of settlement and the District Court's approval of that settlement agreement in 1944, as set forth in the Orr Ditch Decree. *See* Appendix at J-1. Years later, the United States attempted, unsuccessfully, to obtain additional rights to the waters of the Truckee River for the benefit of PLIT. This Court, in *Nevada v. United States,* held that the United States could not relitigate the water rights and affirmed the finality of Orr Ditch Decree. *See Nevada v. United States,* 463 U.S. at 143-144.

In 1991, the Town of Fernley filed an application with the Nevada State Engineer to change the manner and place of use of approximately 280 acre-feet of water, which represents a portion of the waters decreed under Claim No. 3 of the Orr Ditch Decree, water within the Truckee Division of the Newlands Reclamation Project. Both the United States and PLIT protested the application and asserted that the water rights at issue had been forfeited under

Nevada state law. *See* NRS § 533.060 (1979), Appendix at F-1. The motivation for their protest was the same in this litigation as in the litigation leading to this Court's opinion in *Nevada v. United States*, namely, to secure additional water rights for the benefit of PLIT and, specifically, to increase the flow to Pyramid Lake.[1] *See Nevada v. United States*, 463 U.S. at 118-120. Following a hearing on this matter, the State Engineer issued Ruling #4116 rejecting the United States and PLIT's forfeiture argument and approving the Town of Fernley's transfer application. The State Engineer correctly held that the water rights at issue were initiated in accordance with state law prior to the enactment of Nevada's forfeiture law on March 22, 1913. Specifically, the State Engineer held that the water rights at issue were initiated in 1902 by the United States under Nevada law and, although not perfected until after the enactment of the forfeiture statute, under the well recognized doctrine of relation back, and consistent with state law, the water rights at issue relate back to the earlier date when the water right was first initiated and, accordingly, the water rights were not subject to forfeiture under Nevada law.

The United States and PLIT appealed to the United States District Court for the District of Nevada. Like the State Engineer, the District Court held, consistent with the Orr Ditch Decree, that the first act of appropriation and the priority date for all individual Project water rights is July 2, 1902. This date represents the date

---

[1] In the present case, the United States and PLIT's propositions regarding the interpretation of the State of Nevada's forfeiture law, as adopted by the Ninth Circuit, threatens to extinguish, through misapplication of Nevada's forfeiture laws, literally hundreds of valid water rights within the Project. The net effect would be additional water available to benefit PLIT and Pyramid Lake.

that the water rights were first initiated and is the established priority date for all of the water rights at issue. The District Court's reasoning was based on established Nevada water law and the practical realities associated with the administration of water rights. Using an analogy to a line of water users organized by their respective priority dates, the District Court recognized the importance of enforcing the priority date, the date that the water rights were first initiated by the United States, as mandated by the Orr Ditch Decree. The District Court wrote as follows:

> The benefits of creating such a line are obvious. First, those persons standing in line will be limited to only those users who have already obtained, or who are in the process of obtaining, a right to take water ... Second, the water users placed at the front of the line would be secure in the knowledge that they would get water from the river in even the driest of years. In contrast, although users placed at the back of the line would have less assurance of receiving water in dry years, these lower priority users could plan accordingly ... Third, and as a result of the above, each water right gains a relative value according to a user's place in line. For example, persons that did not have a place in line, but who wanted to purchase a spot in line, would know that a water right at the front of the line would be more valuable than a water right at the back of the line. Similarly, those at the front of the line would know that their rights would be sought after by persons wanting to obtain water rights.

See Appendix at p. B-7 - B-9. Generations of water users, based on the Orr Ditch Decree and this Court's opinion in *Nevada v. United States*, felt secure in their positions at the "front of the line" with a common priority date of July 2, 1902, and bought, sold, and planned for the use of their water in reliance thereon.

On appeal, the Ninth Circuit (Judge W. Fletcher, for the majority) reversed the District Court and in so doing effectively destroyed all that previously was thought to be true. Somewhat ironically, the Ninth Circuit agreed with the lower courts that the priority date for all of the rights at issue in this case is 1902. However, it ignored Nevada law that, by definition, the priority date is the date of the initiation of the water right. Under Nevada law, a water right commences not from the date that it is perfected by the ultimate user, but relates back to the date the first step was taken to initiate the water right: the priority date. Instead of following this well established tenet of Nevada water law, the Ninth Circuit concluded that the 1902 priority date was not enough to exempt the water rights from application of the forfeiture statute. Notwithstanding the express language of NRS § 533.085 that nothing in the forfeiture statute shall impair or affect a person's right to take and use water where appropriations had been initiated prior to March 22, 1913, the Ninth Circuit held that the water user, or his or her predecessors in interest, must have "re-initiated" the water right by personally taking affirmative steps to appropriate water for his or her own use on his or her particular parcel of land by March 22, 1913 in order to avoid application of the forfeiture statute despite the fact that the United States had already initiated the same water right in 1902. The effect of this holding is twofold. First, it undermines the continued validity of the Orr Ditch Decree and this Court's holding in *Nevada v. United States*. Second, it creates two sets of water rights under Nevada law: those within the

Reclamation Project now subject to new rules fashioned by the federal court of appeals regarding priority date and the initiation of water rights, and all other water rights in Nevada.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE THE UNITED STATES' INITIATION OF WATER RIGHTS IN 1902 FOR PURPOSES OF DETERMINING THE APPLICABILITY OF NEVADA'S FORFEITURE STATUTE EFFECTIVELY INVALIDATES THE ORR DITCH DECREE AND REVERSES THIS COURT'S HOLDING IN *NEVADA V. UNITED STATES.*

The Orr Ditch Decree and *Nevada v. United States* adjudicated with finality the Truckee River water rights used within the Newlands Project. From those orders, we know several things. First, the initial appropriation of the water of the Truckee River under the Reclamation Act of 1902 was initiated by the United States on July 2, 1902. Second, after the United States initiated the water rights, it acted with due diligence to construct an elaborate canal and irrigation system through which the water eventually would be put to beneficial use. Third, the priority date for the subject water rights relates back to the day the United States first initiated the appropriation of water, July 2, 1902. Finally, all of the above benefits and is binding upon the United States and each and every one of its successors and assigns, including TCID and the water users within the Newlands Reclamation Project. *See Orr Ditch Decree*, Appendix at p. J-1;[2] *Nevada v. United States*, 463 U.S. 110,

---

[2]The applicable portion of the Orr Ditch Decree provide as follows:

143-145 (1983).

There was only one initial appropriation of the water from the Truckee River: that by the United States when it initiated the appropriation of the water from the Truckee River by withdrawing the subject lands and began construction of the irrigation project on July 2, 1902. *See* Orr Ditch Decree, Appendix at p. J-6 - J-7. The water rights, first initiated by the United States, were thereafter acquired by contract and transferred to the ultimate irrigators with a priority date of July 2, 1902. As discussed more fully, below, once the irrigators acquired the contractual right to receive water and

---

> [T]he parties, persons, corporations, intervenors, grantees, successors in interest and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every other one, hereby adjudged to be the owners of the water rights hereinafter specified and set forth ... according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed ... *Claim No. 3* ... Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the interior, on July 2, 1902, withdrew from public entry ... the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River. ... Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff (United States) is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project ...
>
> Orr Ditch Decree, Appendix at p. J-3 - J-7.

placed that water to a beneficial use, the water rights were perfected, but with a priority date based upon the date of the first act of appropriation by the United States on July 2, 1902. It is this date that must be upheld.

The importance of upholding the Orr Ditch Decree, and the priority dates decreed thereunder, cannot be underestimated. The entire system for the administration of water rights is dependent upon the conclusiveness and finality of water right decrees, and the entire system breaks down if those decrees are not enforced. The Court in *Nevada v. United States* explained as follows:

> The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. As this Court explained over a century ago ... "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may by injuriously affected by their change ... [Where] courts vacillate and overrule their own decisions ... affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies ...

Nevada v. United States, 463 U.S. at 129 (*internal citations omitted*). Because the Orr Ditch Litigation was a comprehensive adjudication

of the water rights at issue, its findings are binding upon not only parties to the Orr Ditch Litigation, including the United States, but also on all subsequent water users. *See Nevada v. United States*, 463 U.S. at 143-145.

The fact that the Ninth Circuit's ruling has the effect of reversing both the Orr Ditch Decree and *Nevada v. United States* was not lost on Justice Noonan of the Ninth Circuit. In his reasoned dissent, he wrote:

> In 1902, the United States initiated the appropriation of the water rights here in dispute by the enactment of the Reclamation Act. *See Nevada v. United States*, 463 U.S. 110, 115-117, 77 L. Ed. 2d 509, 103 S. Ct. 2906 (1983). In so doing, the United States acted as trustee on behalf of the later individual owners of land within the Reclamation Project. *Id.* at 126. These water rights were consequently not subject to forfeiture and can now be transferred as the State Engineer and the district court ruled. In reaching the result it does, the majority silently but effectively departs from what the Supreme Court of the United States has already determined.

United States v. Orr Water Ditch Company, 256 F.3d 935, 948 (9th Cir.. 2001).[3]

Granting certiorari to address these issues is appropriate not only because of the implications within the Newlands Reclamation Project in Nevada and because it undermines a decision of this

---

[3] The Ninth Circuit's opinion is included in the Appendix at p. A-1.

Court, but also because of the negative precedent it sets regarding the finality of water right decrees established within federal reclamation projects across the nation. In issuing its decision, the Ninth Circuit effectively ignored the decisions of both federal and state courts that came before it, a dangerous precedent indeed.

II. THE NINTH CIRCUIT'S FAILURE TO ADHERE TO NEVADA SUPREME COURT PRECEDENT AND NEVADA'S STATUTORY PROVISIONS REGARDING THE INITIATION OF WATER RIGHTS IMPINGES UPON THE SOVEREIGNTY OF THAT STATE AND VIOLATES THE EXPRESS PROVISIONS OF THE RECLAMATION ACT OF 1902.

A. The Reclamation Act of 1902 is clear: state law controls on issues relating to the appropriation, use, and distribution of water within federal reclamation projects.

In drafting the Reclamation Act of 1902, it was the express intent of the United States Congress that water rights developed as a result of the reclamation projects be determined and administered in a manner consistent with state law. The applicable portion of the Reclamation Act of 1902 provides as follows:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity

> with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. As recognized by this Court, "the history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 654 (1978). Congress chose this course for good reason. Given the differences between the states in climate, topography, history, and other matters affecting the availability and distribution of water, each state is in the best position to formulate laws relating to the use of water within its borders, and is the most appropriate judge of the interpretation and enforcement of its laws. *Id.* at p. 667 ("'The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another ....In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.'") (*internal citation omitted*).

B. <u>There is no state law support for the Ninth Circuit's position that a second "initiation" of a water right before March 22, 1913 is required for project water users to avoid application of Nevada's forfeiture statute</u>.

In Nevada, there are pre-statutory water rights initiated before March 22, 1913, and statutory water rights arising under codified state law after March 22, 1913. When Nevada enacted the applicable statutes, it was its stated intent that the statutes, including the forfeiture statute, would not work to deprive water users of their pre-statutory water rights. The applicable Nevada code section states:

> Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

NRS § 533.085; *see also In re Manse Spring*, 108 P.2d 311, 315-316 (Nev. 1940) ["It is apparent that the legislature at the time of its enactment of the 1913 statute was careful to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act, and as a precautionary measure wrote into the statute (NRS § 533.085)."] This code section protects two classes of water rights: those that were vested prior to March 22, 1913 *and* those that were initiated prior to March 22, 1913. Vested water rights, involving water actually put to beneficial use prior to March 22, 1913, are protected under the statute. Also protected are those water rights that were initiated prior to March 22, 1913 but that were not actually applied to the land or put to beneficial use until some time after that date. *See e.g.* NRS § 533.324 (defining "water already appropriated" to include water rights that had already been initiated but had not yet been

applied to the intended use)[4].

Under established Nevada water law, a water right is "initiated" when the first steps are taken to appropriate the water. Once those first steps are taken, so long as the appropriator proceeds with due diligence to move the process forward toward actual application to beneficial use, then when the water is placed to beneficial use, its priority date relates back to the date when the first step was taken to appropriate the water. *See Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869) ("When any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it.") In the present case, the work was begun by the United States and, but for the United States' efforts in constructing the dams and canals, the individual farmers could not apply water from the Truckee River to their lands. Accordingly, the water right is recognized *as of the date that it was initiated* by the United States as opposed to the date when it vested.

In the present case, a prior court already held that the United States initiated the water rights at issue on July 2, 1902, that once initiated the United States proceeded with due diligence toward the goal of putting the water to beneficial use, and, consistent with the above, that the priority date of the water rights eventually perfected is July 2, 1902. *See* Orr Ditch Decree; *see also Nevada v. United*

---

[4] When the state legislature adopted this statute, the legislature intended it to codify the existing definition of "water already appropriated", not to change it. Accordingly, the statute was given both retroactive and prospective application. *See* NRS 533.324 (*annotated)* (attached hereto in the Appendix at p. H-1).

States, supra. For this reason, the Ninth Circuit erred when it failed to recognize July 2, 1902 as the date of the initiation of the water rights.

C. The Ninth Circuit incorrectly interposed its opinion of the way water rights should be determined and administered in the state of Nevada when it decided this case.

The Ninth Circuit erroneously determined that "in order for a given water right to receive the protection of Nev. Rev. Stat. § 533.085, the water right must have vested, or an individual landowner must have 'initiated' appropriation of that right, before March 22, 1913." *United States v. Orr Water Ditch Company*, 256 F.3d at 943 (*internal citations omitted).* In other words, rather than recognizing the efforts of the United States initiated in July 1902 to build the dams and irrigation canals that would enable the water to be carried to the farmlands to be put to beneficial use, the Ninth Circuit would only recognize affirmative steps taken by subsequent landowners to appropriate water on his or her particular parcel of land. *Id.* at p. 942-944.

The Ninth Circuit's analysis is flawed for several reasons. First, it is contrary to the law of Nevada which holds that when an individual acquires rights, he stands in the shoes of his predecessor in interest. The change in ownership does not break the chain, it does not require the subsequent owner to begin the process of appropriation anew. *See In re Manse Spring*, 108 P.2d 311, 316 (Nev. 1940). Second, it ignores the very basic fact that the individuals at issue purchased water that had already been appropriated. They entered into contracts with the United States to purchase water that already had been appropriated. The individuals

did not set out to initiate new appropriations, they merely finished what their predecessor in interest, the United States, first began in 1902: the initiation of water rights within the Newlands Reclamation Project and the construction of the supporting works at a cost of $6,250,000.00.[5] Moreover, once they purchased these rights, the water users applied the water to the same land originally withdrawn by the United States. Third, individual water users, like the United States, should not be subjected to different standards based upon the date of the enactment of the 1913 statutes in relation to the date of water contracts. *See United States v. Alpine Land & Reservoir Co.*, 508 F. Supp. 877 (D. Nev. 1980). At issue in that case were a number of contracts entered into by the United States through which the United States acquired water rights. Some of the contracts were entered into prior to 1913, and some after 1913 when Nevada's statutory scheme for the administration of water rights was in place. Nothing in the common law of the state

---

[5] This conclusion is supported by the language of the Orr Ditch Decree which defines both the purpose and the place of use for the waters being appropriated. It states, in pertinent part: "Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project ... Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River ... and with the construction of the Truckee Canal with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres." *See* Orr Ditch Decree, Appendix at p. J-6 - J-7.

of Nevada prior to 1913 required the United States or any other party to file applications for changes in the place of diversion or place of use for water rights. Notwithstanding this, the defendants in that action argued that in failing to make change applications as required by the 1913 statute, the United States forfeited its claimed rights. The Court disagreed and held that the United States was entitled to carry out and complete the Project under the Nevada law as it existed when the Project plan was commenced in 1902. Specifically, the Court held that the intervening enactment of Nevada's water code could not be used to destroy the rights acquired by the United States and, further, that "for the Newlands Project the applicable Nevada law was the state water law as it existed in 1902." *Id.* at 884-885. In sum, because the water rights at issue in the present case were purchased from the United States, the present water users stand in the shoes of the United States and get what the United States had: rights based upon Nevada law as it existed in 1902. *Id.* Finally, the Ninth Circuit's analysis is flawed because it fails to recognize that the individual water users could not, based on the location of the lands in relation to the Truckee River, appropriate water from the Truckee River but for the acts of the United States in constructing the dams and canals that would make irrigation of the lands possible. For all of the above reasons, in failing to recognize 1902 as the date of the initiation of the water rights, the Ninth Circuit acted contrary to the facts of this case and contrary to Nevada law.

In support of its opinion, the Ninth Circuit relied on its holding in a separate case, *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993) ("*Alpine III*") (*see* Appendix at K-1) and on a new theory based on the "investment backed expectations" of the individual water users. However, neither the Ninth Circuit's prior decision in *Alpine III*, nor the investment backed

expectations theory justify a departure from established Nevada water law.

The Ninth Circuit's decision in *Alpine III* is inapplicable to the instant action. In that case, the issue before the Ninth Circuit was whether water rights *vested* in 1902 for purposes of determining the applicability of Nevada's forfeiture statute. In the present case, the issue is whether the water rights at issue were *initiated* in 1902. As Justice Noonan wrote in his dissent:

> [The majority] misinterprets Alpine III. That case was about vesting; this court reversed the State Engineers's (sic) erroneous determination that water rights had vested in 1902. *Alpine III*, 965 F.2d 731, 738 (9th Cir. 1992). When it was brought to the court's attention that the court had said nothing about the initiation of appropriation of rights (an issue not before it) the court amended its disposition to remand the question of initiation. *Alpine III*, as amended, 983 F.2d 1487, 1496 (9th Cir. 1993).

United States v. Orr Water Ditch Company, 256 F.3d at 949. Stated another way, *Alpine III* addressed the first prong of NRS § 533.085 (regarding the effect of the forfeiture statute on rights which vested before 1913), whereas the present case involves the second prong of that statute (regarding the effect of the forfeiture statute on water rights initiated in accordance with law prior to March 22, 1913). In his opinion, in *United States v. Alpine Land & Reservoir Co.*, 27 F.Supp.2d 1230 (1998) (*see* Appendix at L-1), District Court Judge McKibben, while following the holdings of *Alpine III*, agreed that the 1902 priority date should be controlling on the issue of forfeiture. Appendix, p. L-16.

The Ninth Circuit also based its opinion on an analysis regarding the "investment backed expectations" of the individual water users. *See United States v. Orr Water Ditch Company*, 256 F.3d at 942-943. Judge W. Fletcher opined that there is "no reason to protect individuals who began the process of acquiring water rights after the effective date of the statute, because they did so with notice that any water rights they acquired would be subject to forfeiture." *Id.* To the contrary, as successors in interest to the United States, and pursuant to Nevada law, those individuals would have every reason to believe that the water rights they purchased carried with them the same priorities, rights and title as held by any other individual or entity who preceded them. This conclusion is supported by the fact that, after passage of the State statutes, any person who wanted to initiate a new water right had to file an application for a permit to appropriate water with the Nevada State Engineer and in this case none of the water rights at issue were initiated by such an application because they were already initiated by the United States under the Nevada law in place in 1902 as required by Section 8 of the Reclamation Act of 1902. *See* NRS § 533.335 (Application for permit to appropriate water); *see also* State Engineer's Ruling #4116 at p. 9.[6] Further, the Ninth Circuit's

---

[6] The State Engineer found the following:

> Beginning in 1905, any person who wanted to initiate a water right in Nevada was required to obtain a permit from the Nevada State Engineer. The water rights that are the subject of Application 56226 were not initiated by an application to the Nevada State Engineer. Instead, all of the water rights requested to be changed under Application 56226 were initiated in accordance with the Reclamation Act, as evidenced by the documents submitted to

investment backed expectations analysis ignores the fact that everyone entered into nearly identical contracts when they purchased water from the United States. If the Ninth Circuit is correct regarding its investment backed expectations analysis, then individuals who signed their contracts before 1913 would have different legal rights regarding what they acquired compared to those who signed after 1913 notwithstanding the fact that their contracts are nearly identical. Under the Ninth Circuit's analysis, pre-1913 contracts would not be subject to Nevada's statutory forfeiture laws, only to laws involving common law abandonment. On the other hand, rights purchased by way of post-1913 contracts would be subject to potential loss under either the forfeiture statute or through proof of common law abandonment. Because it is much easier to prove forfeiture as opposed to abandonment under Nevada law, rights purchased prior to 1913 would be much more valuable than those purchased after that date. *See* NRS § 533.060, Appendix at F-1, *see also: United States v. Orr Water Ditch Company*, 256 F.3d 935, 941 (9th Cir. 2001) ("In most cases, it is easier to establish forfeiture than abandonment because forfeiture requires only a showing of non-use for five successive years. Abandonment, on the other hand, is the 'relinquishment of the right by the owner with the intention to forsake and desert it.'") (*internal citations omitted)*. The end result would be absurd: the same contract would have a

---

> the United States Department of the Interior by the original water right holder. Therefore, the State Engineer finds that the appropriation of the water rights requested to be changed under Application 56226 was initiated in accordance with the law in effect prior to March 22, 1913.

See State Engineer's Ruling #4116, p. 9 (Appendix at p. C-10 - C-11).

different value based only on the date that it was signed. The Ninth Circuit's investment backed expectations analysis also is flawed because if you apply the 1913 statutes to rights initiated prior to that date just because title passed from one to another after the passage of the 1913 statutes, it raises constitutional concerns relating to the retroactive application of that statute and runs contrary to this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

Pursuant to the express terms of the Reclamation Act of 1902 and case law interpreting that statute, issues relating to the control, appropriation, use, or distribution of water are issues of state law. Federal courts are bound to follow the laws of the individual states in deciding these issues. Accordingly, the Ninth Circuit erred when it substituted its judgment for that of the state of Nevada. This Petition for Writ of Certiorari should be granted to correct this error and to protect states' sovereign right to administer water rights within their borders.

CONCLUSION

Granting a petition for writ of certiorari is appropriate when the Court of Appeals has entered a decision that conflicts with decisions of this Supreme Court or when it has decided an issue that conflicts with a decision by a state court of last resort. In the present case, the Ninth Circuit did both. Its ruling effectively overrules this Court's opinion in *Nevada v. United States*, it undermines established law that a State's law controls water law issues that arise within its borders, and it is in direct conflict with Nevada Supreme Court cases on the law of prior appropriation. Because the decision will impact the administration of water rights not only within the Newlands Reclamation Project, but in federal reclamation projects across the nation, and because it represents

such a radical departure from the case law developed both by this Court and the Nevada Supreme Court, granting this Petition for Writ of Certiorari is appropriate. Accordingly, Petitioner, TCID, respectfully submits this Petition for Writ of Certiorari and requests that this Court grant the same.

Dated: San Francisco, California
February 6, 2002

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER,
BEDFORD & VAN ZANDT, LLP
Attorneys for Petitioners
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*

(2)
Supreme Court, U.S.
FILED
011224 FEB 6 2002
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT;

Petitioner,
vs.
UNITED STATES OF AMERICA AND
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER,
BEDFORD & VAN ZANDT, LLP
Attorneys for Petitioners
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*

165pp

TABLE OF CONTENTS

Opinion filed July 5, 2001 ..... A-1
Order dated May 14, 1999 ..... B-1
State Engineer's Ruling 4116 ..... C-1
Order dated November 8, 2001 ..... D-1
USCS § 383 ..... E-1
NRS § 533.060 ..... F-1
NRS § 533.085 ..... G-1
NRS § 533.324 ..... H-1
NRS § 533.325 ..... I-1
Orr Ditch Decree J-1
U.S. v. Alpine 983 F.2d K-1
U.S. v. Alpine 27 F.Supp. L-1
Petition for Panel Rehearing August 20, 2001 ..... M-1

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

v.

ORR WATER DITCH COMPANY, et al.,

Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,

Defendants-Appellees.

No. 99-16817

D.C. No. CV-N-A-3-LDG

Town of Fernley; Appeal of State Engineer Ruling No. 4116

OPINION

Appeal from the United States District Court for the District of Nevada

Lloyd D. George, District Judge, Presiding

Argued and Submitted

December 11, 2000 – San Francisco, California

Filed July 5, 2001

Before: Mary M. Schroeder, Chief Judge, John T. Noonan and William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher;

Dissent by Judge Noonan

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

v.

ORR WATER DiTCH COMPANY, et al.,

Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,

Defendants-Appellees.

No. 99-16817

D.C. No. CV-N-A-3-LDG

Town of Fernley; Appeal of State Engineer Ruling No. 4116

SUMMARY

Real Estate/Water Rights

The court of appeals reversed a judgment of the district court. The court held that the 1902 withdrawal of land from public entry for the federal Newlands Reclamation Project (Project) in Nevada did not initiate the appropriation of a water right subject to protection under the Nevada anti-forfeiture statute.

Appellee town of Fernley, Nevada, applied to the Nevada State Engineer to change the manner and place of use of 26 separate water use permits in the Project. The federal government operated the Project, but water rights in the project were held by individual landowners pursuant to contracts between the landowners and the Department of the Interior. The reservation of Appellants Pyramid Lake Paiute Tribe of Indians (Tribe) surrounded Pyramid Lake. The Tribe opposed the application on the basis that the current flow of the Truckee River into Pyramid Lake would be diminished if the application were granted, thus adversely affecting the Tribe's economy, culture, and hentage. The United States joined the Tribe

in opposition to the transfer. The Tribe and the government contended that the water rights at issue no longer existed because the prior holders of those rights failed to exercise them for an extended period of time, and thus the water rights were forfeited under Nevada statutory law, or alternatively, were abandoned under Nevada common law.

The State Engineer rejected the Tribe's forfeiture argument, concluding that the rights at issue were exempt from forfeiture under the anti-forfeiture statute, as the appropriation of the rights was "initiated" in 1902, when the United States initiated the Project. He further found that the rights were not abandoned under the common law as Nevada did not recognize a legal presumption in favor of abandonment upon a showing of prolonged non-use, and absent such a presumption the Tribe had produced no evidence of abandonment.

The Tribe and the government appealed the State Engineer's ruling to federal district court. The district court affirmed the State Engineer's decision. The Tribe and the government appealed.

[1] The Nevada forfeiture statute, which took effect on March 22, 1913, provides that a water right is forfeited if it is shown not to have been exercised for five successive years. However, under an anti-forfeiture provision, forfeiture does not apply to water rights that were vested, or for which appropriations were initiated, before the forfeiture statute took effect.

[2] In order for a given right to receive the protection of the anti-forfeiture provision, an individual landowner must have taken affirmative steps to appropriate water for his or her own use by the statute's effective date. At the very least, he or she must have contracted with the federal government for delivery of Project water prior to that date. Thus, the State Engineer erred in concluding that all water rights were initiated as of 1902. The district court made the same error in concluding that because each individual Project water right had a "priority date" of July 2, 1902, it was therefore initiated, within the meaning of the

anti-forfeiture statute, on that same date.

[3] Water rights exempted under the anti-forfeiture statute are subject to the common law principle of abandonment, which requires a showing of subjective intent on the part of a water-right holder to give up that right. [4] Under Nevada case law, although a prolonged period of non-use may be taken into consideration in determining whether a water right has been abandoned, such non-use does not raise a rebuttable presumption of intent to abandon. [5] Abandonment is determined from all the surrounding circumstances. Where there is evidence of a substantial period of non-use combined with evidence of the construction of structures which are inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. Where, on the other hand, there is only evidence of non-use combined with the finding of a payment of taxes or assessment, there will not be clear and convincing evidence to establish abandonment.

Judge Noonan dissented, writing that the anti-forfeiture statute exempted the water rights at issue, as the initiation date for all of those rights was 1902, at the time the United States began the Project.

COUNSEL

Katherine J. Barton, U.S. Department of Justice, Washington, D.C., for plaintiff-appellant United States of America.

Robert S. Pelcyger, Fredericks, Pelcyger & Hester, Louisville, Colorado, for petitioner-appellant Pyramid Lake Paiute Tribe of Indians.

Ross B. de Lipkau, Marshall Hiss Cassas & de Lipkau, Reno, Nevada, for defendant-appellee Town of Fernley.

Michael J. Van Zandt, McQuaid, Metzler, Bedford & Van Zandt, San Francisco, California, for defendant-appellee Truckee-Carson Irrigation District.

David Creekman, Carson City, Nevada, for defendant-appellee The State Engineer.

OPINION

W. FLETCHER, Circuit Judge:

The town of Fernley, Nevada, has applied to the Nevada State Engineer to change the manner and place of use of rights to roughly 280 acre-feet of water from the federal Newlands Reclamation Project. The Pyramid Lake Paiute Tribe of Indians and the federal government oppose the proposed transfers, contending that the water rights at issue have been forfeited or abandoned under Nevada state law. The district court affirmed the decision of the Nevada State Engineer that none of the water rights had been forfeited or abandoned. We reverse and remand for further proceedings.

I. Factual Background

The Newlands Reclamation Project ("the Project") diverts the flow of the Truckee and Carson rivers to supply the needs of water users in Nevada. The Project has two divisions,

named after the two rivers. At Derby Dam, the Project diverts part of the flow of the Truckee River southward through the Truckee Canal to join the Carson River at Lahontan Reservoir. From Lahontan Reservoir, the augmented Carson flows east, where its water is distributed to users in and around the city of Fallon, in what is known as the "Carson Division" of the Project. The Project also diverts part of the water in the Truckee Canal before it reaches the Lahontan Reservoir. The water from this diversion is distributed to users in and around the town of Fernley, in what is known as the "Truckee Division." Water from the Truckee River that is not diverted through the Truckee Canal into either of the divisions flows north into Pyramid Lake. The federal government operates the Newlands Project, but water rights in the Project are held by individual landowners pursuant to contracts between the landowners and the Department of the Interior. The nature and extent of those water rights are determined, in large part, by Nevada state law.

The town of Fernley seeks to satisfy its growing water needs by acquiring water rights in the Truckee Division of the Project. This water

has historically been used for irrigation purposes, but Fernley would use it for municipal and industrial purposes instead.[1] Fernley filed an application with the Nevada State Engineer to change the manner and place of use of 26 separate water use permits it has acquired, totaling roughly 280 acre-feet of Project water. This is a relatively small transfer, but it raises questions common to many other transfers contemplated by Fernley.[2]

The Pyramid Lake Paiute Tribe of Indians ("the Tribe") resides on a half-million acre reservation in Nevada that surrounds Pyramid Lake, a body of water the Supreme Court has described as perhaps "the most beautiful desert lake in North America." *Nevada v. United States,* 463 U.S. 110, 114 (1983). Pyramid Lake once received the entire flow of the Truckee River, but it now receives only what remains after the river has been tapped by the Newlands Project. In years past, Project diversions have adversely affected the size and ecology of the lake, threatening several varieties of fish, one of which (the cui-ui) is an endangered species. If Fernley' s transfer application is granted, its water rights will be

---

[1]Congress authorized municipal use of Project waters in the Truckee- Carson-Pyramid Lake Water Rights Settlement Act. Pub. L. No. 101-618 ° 209(a)(l), 104 Stat. 3289 (1990).

[2]2We note that Nevada has recently revised Nev. Rev. Stat. § 533.060 and Nev. Rev. Stat. § 533.037, pertaining to forfeiture and abandonment. These revisions, however, do not affect this case because they do not apply to water rights that have been challenged in a legal or administrative proceeding pending on or before April 1, 1999. Moreover, neither statute "constitute[s] a legislative declaration that the law to be applied in any such pending proceeding is different from or the same as set forth in this act." See Section 7 of ch. 15, Statutes of Nev. 1999, at 2364.

exercised and the current flow of the Truckee River into Pyramid Lake will be diminished. *See United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1221 (9th Cir. 1989) ("*Alpine II*"). The Tribe opposes Fernley's application because its economy, culture, and heritage are linked to the size of the flow of the Truckee River and to the health of Pyramid Lake.

The Tribe entered a timely opposition to Fernley's proposed transfer, and the United States joined the Tribe in opposition to the transfer. See 1990 Settlement Act, P.L. 101-618, 104 Stat. 3289 §§ 202, 209 (assigning Secretary of Interior the duty to protect the Tribe and the resources of Pyramid Lake); *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F. Supp. 252, 256 (D.D.C. 1973), *rev'd on other grounds,* 499 F.2d 1095 (D.C. Cir. 1974). The Tribe and the government contend that the water rights that Fernley seeks to transfer no longer exist because the prior holders of those rights failed to exercise them for an extended period of time. In water law parlance, they contend that the water rights have been "forfeited" under Nevada statutory law, or have been "abandoned" under Nevada common law.

The initial decisions on the proposed transfers were made by the Nevada State Engineer pursuant to his authority under Nev. Rev. Stat. §§ 533.345 and 533.370, and *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 885 (D. Nev. 1980) ("*Alpine Decree*"), *aff'd as modified,* 697 F.2d 851, 857-58 (9th Cir. 1983) ("*Alpine I*"), *cert. denied,* 464 U.S. 863 (1983). The State Engineer approved the transfer of all but a few of the water rights at issue. He first entered factual findings that Fernley was the *bona fide* owner of the water rights and that the town had been paying the operation and maintenance fees for those rights. He then made a number of other legal and factual findings. We describe those that are relevant to this appeal.

First, the Engineer rejected the argument that some of the water rights at issue had been forfeited under Nev. Rev. Stat. § 533.060(2)

(1997).[3] The Tribe and the government had agreed that Nevada law protected from forfeiture water rights that had been "vested," or for which appropriations had been "initiated," before the passage of the forfeiture statute on March 22, 1913. *See* Nev. Rev. Stat. § 533.085. But they contended that some of the water rights at issue were subject to forfeiture because the rights had not vested, and appropriations had not been initiated, before March 22, 1913. The Engineer disagreed, concluding that under Nevada's "relation back" doctrine, appropriations of all of the rights at issue were "initiated" within the meaning of Nev. Rev. Stat. § 533.085 in July 1902, when the United States government initiated the Newlands Project. The Engineer therefore ruled that all of the water rights at issue were exempt from forfeiture under Nev. Rev. Stat. § 533.085.

---

[3]3For ease of reference in this opinion, we will refer to the version of Nev. Rev. Stat. § 533.060(2) in effect before the 1999 amendments to that statute without specifically noting that we are referring to the pre-1999 version. The statute, as it existed before 1999, provides:

> Except as otherwise provided . . . if the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir or other means of diversion had never been constructed, and any qualified person may appropriate any such water for beneficial use.

Second, the Engineer rejected arguments that non-forfeited water rights were abandoned under Nevada common law. He ruled that Nevada did not recognize a legal presumption in favor of abandonment upon a showing of prolonged non-use, and that in the absence of such a presumption the Tribe had produced "no evidence" to indicate that abandonment had occurred. The Tribe and the government appealed the Engineer's rulings to federal district court in Nevada, pursuant to the procedure approved by this court in *Alpine I. See* 697 F.2d at 857-58; *see also United States v. Orr Water Ditch Co.,* 914 F.2d 1302, 1308 (9th Cir. 1990). The district court affirmed and denied a later motion for reconsideration. The Tribe and the government appeal to this court. We reverse and remand.

II. Legal Background

Water litigation is a weed that flowers in the arid West. The federal courts first considered water rights issues in the Newlands Project in 1913, in a quiet-title action instituted by the United States. Over thirty years after that suit was initiated, a Nevada district court finally adjudicated water rights in the Truckee Division of the Project. See *United States v. Orr Water Ditch Co.,* In Equity, Docket No. A-3 (D. Nev. Sept. 4,1944) ("*Orr Ditch Decree*"). Thirty-six years after that, we adjudicated water rights in the Carson Division. *See Alpine Decree,* 503 F. Supp. at 877, *aff'd, Alpine I,* 697 F.2d at 851.

Of particular relevance to this case is a series of decisions involving water rights in the Carson Division. Following the *Alpine Decree* and our affirmance of that decree in *Alpine I,* many water right holders in the Carson Division sought to transfer water rights that were appurtenant to other Project land to their own land. As in this case, the Tribe opposed many of the transfer applications on the grounds that the rights had been forfeited or abandoned. When the State Engineer ruled that Nevada's statutory forfeiture provision did not apply to the water rights at issue and that there was no evidence of abandonment, the Tribe appealed.

Initially, a district court affirmed the Engineer on the ground that Nevada law did not apply at all, but in *Alpine II* we disagreed. We reversed and remanded to the district court for review of the Engineer's findings on forfeiture and abandonment based on state law. On remand, the district court affirmed the Engineer's findings. Once, again, the Tribe appealed to this court, and, in *United States v. Alpine Land & Reservoir Co.*, 965 F.2d 731 (9th Cir. 1992), *amended by United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993) ("Alpine III"), we once again reversed.

On the question of forfeiture, we held that the Engineer had erred in determining that, because of the exemption created in Nev. Rev. Stat. § 533.085. Nevada's forfeiture statute did not apply to the water rights in question. The Engineer had written, "The existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authorized Lahontan Dam in 1902." *Id.* at 1495. We disagreed, noting that "the individual rights at issue. . . did not vest in 1902 when the United States obtained Project-wide rights." *Id.* at 1496. We concluded that individual water rights were exempted from the Nevada forfeiture statute only if the rights were vested, or the appropriations had been initiated, prior to 1913:

> If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.

Id. We therefore remanded for an individualized determination, for each parcel at issue, of "whether and when the right vested, and under which law appropriation was initiated." *Id; see also United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230 (D. Nev. 1998) ("*Alpine IV*") (district court's opinion on remand).

On the question of abandonment, we held that the State Engineer had abused his discretion by failing to conduct an individualized inquiry to

determine whether each water right sought to be transferred had been abandoned by the transferor property owner. *Alpine III,* 983 F.2d at 1494. As of the time we write this opinion, the State Engineer has yet to make the findings required under *Alpine III.* Therefore, while our cases involving the Carson Division (in particular, *Alpine III*) set forth the legal rules for adjudicating questions of forfeiture and abandonment of water rights in the Newlands Project, this Truckee Division case presents the first time we have been asked to review the State Engineer's application of these rules.

III. The Law of Forfeiture and Abandonment

Water rights can be lost in Nevada either through forfeiture or abandonment. In most cases, it is easier to establish forfeiture than abandonment because forfeiture requires only a showing of non-use for five successive years. Abandonment, on the other hand, is the "relinquishment of the right by the owner with the intention to forsake and desert it." *In re Manse Spring,* 108 P.2d 311, 315 (Nev. 1940) (citation omitted). Abandonment therefore requires a showing of actual intent to abandon. Non-use can provide "some evidence" of intent, *see In re Franktown Creek,* 364 P.2d 1069, 1072 (Nev. 1961), but it is not by itself sufficient to establish abandonment. In the case now before us, the Tribe and the government argue that some of the water rights in question are subject to forfeiture. Fernley argues that none of the water rights are subject to forfeiture. The parties agree that all of the water rights are subject to abandonment.

A. Forfeiture

[1] Under Nevada law, a water right is forfeited if it is shown not to have been exercised for five successive years. *See* Nev. Rev. Stat. § 533.060. However, Nevada law specifies that the forfeiture statute does not apply to water rights that were vested or for which appropriations were initiated before that statute took effect, on March 22, 1913:

> Nothing contained in this chapter [establishing the

> statutory rule of forfeiture] shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Nev. Rev. Stat. § 533.085(1). If a water right is exempted from the Nevada forfeiture statute, it may be lost only through abandonment.

We considered the relationship between Nev. Rev. Stat. § 53 3.060 and § 533.085 in our decision in *Alpine III.* In that case, the State Engineer had determined that the forfeiture statute did not apply to the water rights at issue because "[t]he existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authonzed Lahontan Dam in 1902. 983 F.2d at 1495. The Engineer assigned all Newlands Project water rights a single vesting date for purposes of Nev. Rev. Stat. § 533.085 – the 1902 date on which Congress initiated the Newlands Project. We rejected this approach in *Alpine III* and instead held that a water right had to be vested, or that appropriation of that right had to have been initiated, for the particular parcel of land to which it was appurtenant for that nght to be exempt from forfeiture under § 53 3.085. *See* 983 F.2d at 1495-97.

Given the purpose of § 533.085, this was a sensible construction of the terms "vested" and "initiated" as used in that statute. The passage of the Nevada forfeiture statute in 1913 made water rights more precarious. Prior to its passage, water rights could be lost only through abandonment; now they could also be lost through forfeiture. To the extent that a water right could be lost more easily after the passage of the forfeiture statute, one "stick" in the "bundle of sticks" that had previously comprised that water right had been taken away.

For water-right holders whose rights had vested by 1913, or who had already initiated appropriations of their rights by that date, the new forfeiture statute could work unfairly because these holders had obtained or initiated appropriations of their rights on the understanding that those rights would not be subject to forfeiture. Indeed, with respect to those individuals, the statute could be more than Just unfair; it could even be unconstitutional, for its removal of one stick from the bundle of sticks comprising a water right could be seen as an unconstitutional taking of property. The Nevada legislature alleviated concerns about unfairness and unconstitutionality by exempting both categories of holders from forfeiture under § 53 3.060. If a holder either possessed a vested water right on March 13, 1913, or had initiated appropriation of a water right by that date, the right-holder was protected from forfeiture by § 533.085. In the jargon of modern takings law, if a water right holder had an investment-backed expectation as of the effective date of the statute, that holder's water right was exempt from forfeiture.

Given the purpose of § 533.085, it does not make sense to read the term "initiated" to refer to 1902, the date the United States initiated the water rights for the entire Newlands Project. Such a reading would protect water-right holders who had done nothing at all to acquire water rights as of the date of the forfeiture statute. There was reason to protect individuals whose investment-backed expectations would be violated by § 533.060, and § 533.085 did so by exempting their rights from forfeiture. But there was no reason to protect individuals who began the process of acquiring water rights after the effective date of the statute, because they did so with notice that any water rights they acquired .would be subject to forfeiture.

As we explained in *Alpine III,*

> According to the Nevada Supreme Court, the Nevada legislature included the provision exempting pre-1913 nghts from impairment to refrain from infringing upon rights which had accrued at that time, so as to avoid any

question of the constitutionality of the Act." *Manse Spring,* 108 P.2d at 315.

* * *

The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in *Manse Spring* that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source. Accordingly, *with the purpose of the statute in mind,* it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land.

* * *

If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.

Alpine III,, 983 F.2d at 1496 (emphasis added).

[2] We held in *Alpine III* that in order for a given water right to receive the protection of Nev. Rev. Stat. § 533.085, that water right must have vested, or an individual landowner must have "initiated" appropriation of that right, before March 22, 1913. In other words, the

landowner must have taken affirmative steps to appropriate water for his or her own use by that date. In practice, this means that the individual must have (at the very least) contracted with the federal government prior to that date for delivery of Project water. Accordingly, we hold that the State Engineer erred in concluding that, for purposes of § 533.085, all water rights in the Truckee Division were "initiated" when land for the Newlands Project was withdrawn from public entry by the federal government in 1902. We further hold that the district court made the same error when, in affirming the Engineer, it concluded that because each individual Project water right has a "priority date" of July 2, 1902, it was therefore initiated, within the meaning of § 533.085, on that same date.

We agree with the Engineer and the district court that the priority date for all of the rights at issue in this case is 1902. The Orr Ditch Decree, affirmed by the Supreme Court, established this priority date. See *Nevada v. United States,* 463 U.S. at 117. But our holding in *Alpine III* did not concern a priority date. Rather, it concerned the forfeiture exemption provided by § 533.085.

In *Alpine III,* we remanded the case for a determination of vesting and initiation dates for particular parcels. The district court to which we remanded in *Alpine III* understood our holding in the same way we understand it today, writing that *Alpine III* "drew a distinction between the rights obtained by the United States and the rights appurtenant to particular tracts of land" for purposes of Nev. Rev. Stat. § 533.085. *Alpine IV,* 27 F. Supp. 2d at 1240. The district court accordingly directed the Engineer to determine "when the individual landowner took the 'first steps' to appropriate the water appurtenant to his land, and not [to] rely on the 1902 priority date." *Id.* at 1241. Failure to do so, the district court observed, would be an abuse of discretion. *See id.*

Our reading of *Alpine III* is reinforced by the history of that decision. After a petition for rehearing, the *Alpine III* panel modified its opinion. The original language of the *Alpine III* remand order appears at

965 F.2d 739:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether when [sic] the right vested. Only if the right vested after March 22, 1913 would it be subject to possible forfeiture under NRS 533.060.

This language caused some concern to the appellees in that case, the State Engineer and the Truckee-Carson Irrigation District ("TCID"). They pointed out that Nev. Rev. Stat. § 533.085 protects not only the "vested right of any person to the use of water" but also "the right of any person to take and use water . . . where appropriations have been *initiated* in accordance with law prior to March 22, 1913." Nev. Rev. Stat. 533.085 (emphasis added). TCID argued in its brief that "[t]he Court's focus on the vesting date of these water rights ignores the fact that the same protection afforded vested water rights was also extended to non-vested water rights in the Nevada Water Law of 1913." It then stated that there was "no question" that the water rights at issue were "initiated" prior to 1913. The State Engineer's brief argued that *Alpine III* had ignored the principle of "relation back" by separating "vesting date" from "priority date," and had erred in distinguishing the water rights acquired by the federal government from the Project farmers' water rights. Once the farmers received their land patents, the Engineer argued, "the Project farmers acquired the Government's interest in the water rights, and once the water was put to beneficial use, these rights dated back to 1902."

In response to the petition for rehearing, the *Alpine III* panel modified its opinion so that the final paragraph of Section IV now reads:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether <u>and</u> when the right vested, <u>and under which law appropriation was initiated</u>. <u>If</u> the right vested <u>before</u>

March 22, 1913 or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.[4]

The panel thus rejected the argument that all appropriations were initiated in 1902, and remanded for individual determinations.

B. Abandonment

[3] In addition to claiming that some of the water rights at issue in this case have been forfeited under Nevada statutory law, the Tribe also claims that some of them have been abandoned under Nevada common law. Under Nevada law, abandonment is "the relinquishment of the right by the owner with the intention to forsake and desert it." *Manse Spring,* 108 P.2d at 315. Abandonment thus requires a showing of subjective intent on the part of the holder of a water right to give up that right.

Subjective intent is difficult to prove by direct evidence. Few water-right holders say in front of witnesses, "I intend to abandon my water rights." Therefore, indirect and circumstantial evidence must almost always be used to show abandonment. Many states have adopted legal presumptions designed to ease the burden upon the challenger and to increase the likelihood that water will be put to beneficial use. In particular, nearly all western states presume an intent to abandon upon a showing of a prolonged period of non-use. *See, e.g., Okanogan Wilderness League, Inc., v. Town of Twisp,* 947 P.2d 732, 739 (Wash. 1997); *In re Clark Fork Drainage Area,* 908 P.2d 1353, 1356 (Mont. 1995); *Consolidated Home Supply Ditch and Reservoir Co. v. Town of Berthoud,* 896 P.2d 260, 266 (Cob. 1995); *State ex rel. Reynolds v. South Springs Co.,* 452 P.2d 478, 482-83 (N.M. 1969); *Yentzer v.*

---

[4]The underlined portions of the paragraph were added or altered in the amended version of *Alpine III.*

Hemenway, 440 P.2d 7,13 (Wyo. 1968); *Utt v. Frey,* 39 P. 807, 809 (Cal. 1895).

The State Engineer ruled in this case, however, that Nevada does not include such a presumption in its common law of abandonment, and that the Tribe could not therefore shift the burden of proof to require Fernley to show affirmatively that there was no intent to abandon merely by showing a prolonged period of non-use. The district court agreed. While we consider the State Engineer's interpretations of Nevada statutes "persuasive," they are not controlling. We review the district court's conclusions of law *de novo. See Alpine II,* 878 F.2d at 1222; *Town of Eureka v. State Engineer,* 826 P.2d 948, 949 (Nev. 1992). On *de novo* review, we agree with the district court.

[4] Under Nevada case law, a prolonged period of non-use may be taken into consideration in determining whether a water right has been abandoned, *see Manse Spring,* 108 P.2d at 316, and non-use "may inferentially be some evidence of an intent to abandon." *Franktown Creek,* 364 P.2d at 1072. But Nevada law goes no further than an inference. It is only a matter of degree, but a legal presumption is stronger than an inference. None of the cases cited by Fernley explicitly disclaims a presumption, but neither the Tribe nor the government cites any Nevada decision showing that Nevada law has changed since our decision in *Alpine III,* where we stated "[t]hough the longer the period of nonuse, the greater the likelihood of abandonment, we find no support for a rebuttable presumption under Nevada law." 983 F.2d at 1494 n.8; *see also Alpine IV,* 27 F. Supp. 2d at 1242. We acknowledge that Nevada appears to be the only western state that maintains this position, but in our federal system it is entitled to do so.[5]

---

[5]Nevada has recently reaffirmed its commitment to a limited view of the law of abandonment. As amended in 1999, Nev. Rev. Stat. § 533.060(4) now states (emphasis added):

[5] On appeal to this court, the Tribe asserts that the State Engineer was wrong to consider payment of operation and maintenance fees as sufficient evidence to support a finding that the particular water rights had not been abandoned. According to the Nevada Supreme Court, abandonment is to be determined "from all the surrounding circumstances," and those circumstances certainly include the payment of assessments and taxes. *Revert v. Ray,* 603 P.2d 262, 264 (Nev. 1979); *see also Alpine IV,* 27 F. Supp. 2d at 1243. But payment of fees is not the only factor to be considered when there is conflicting evidence on the issue of abandonment. Other important circumstances to be considered include non-use of the water right, *see Franktown Creek,* 364 P.2d at 1072; *Manse Spring,* 108 P.2d at 316, and the construction of structures incompatible with irrigation. See Nev. Rev. Stat. § 533.045 ("When the necessity for the use of water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of this state except at such times as the water is required for a beneficial purpose."). In order to guide the

---

> In a determination of whether a right to use surface water has been abandoned, a presumption that the right to use the surface water has *not* been abandoned is created upon the submission of records, photographs, receipts, contracts, affidavits or any other proof of the occurrence of any of the following events or actions within a 10-year period immediately preceding any claim that the right to use the water has been abandoned: (a) The delivery of water; (b) The payment of any costs of maintenance and other operational costs incurred in delivering the water; (c) The payment of any costs for capital improvements, including works of diversion and irrigation; or (d) The actual performance of maintenance related to the delivery of the water.

district court and the State Engineer in this and other abandonment proceedings, we endorse the district court's statement in *Alpine IV:*

> Where there is evidence of both a substantial period of nonuse, combined with evidence of an improvement which is inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. If, however, there is only evidence of nonuse, combined with the finding of a payment of taxes or assessments, the court concludes that the Tribe has failed to provide clear and convincing evidence of abandonment.

27 F. Supp. 2d at 1245.

IV. Application of the Law of Forfeiture and Abandonment

A. Forfeiture

As explained above, the State Engineer ruled that, for purposes of Nev. Rev. Stat. § 533.085, the water rights at issue all have an initiation date of 1902. He therefore found that none of the water rights is subject to forfeiture under § 533.060. The Engineer also made alternate findings based on the assumption that the water rights were not initiated in 1902 and were therefore subject to forfeiture.

In his alternative findings, the Engineer assumed that the water rights appurtenant to parcels 1, 3, 8, 9, 10, 16, 19, and 20 were not protected from forfeiture. Accordingly, the Engineer examined evidence introduced by the Tribe to determine if any of these eight water rights were not exercised during "any 5 successive years." Nev. Rev. Stat. § 533.060. The Engineer evaluated the evidence presented for these parcels and concluded that only one of the appurtenant water rights had been forfeited. As to the others, he found that the Tribe had failed to prove the statutory period of non-use "by clear and convincing evidence." *Town of Eureka,*

826 P.2d at 952.

The district court did not review the Engineer's alternative findings with respect to forfeiture because it agreed with the Engineer that the only applicable legal theory was abandonment. We are reluctant to review the Engineer's findings without allowing the district court to do so first. Even if we were willing to conduct such a review, however, we could not do so on the record before us. While the record includes the Engineer' s ruling, it does not contain the evidence introduced in the proceeding before the Engineer. We therefore remand to the district court. On remand, the district court will have the opportunity to review the Engineer's forfeiture findings on a parcel-by-parcel basis, and to incorporate into the district court record the evidence submitted to the Engineer relevant to those findings.

Despite the limitations imposed by the current state of the record, it may be appropriate for us to comment on what we do have before us. We are concerned that the Engineer may have misunderstood the "clear and convincing evidence" standard necessary to establish forfeiture. For example, we note his ruling that the Tribe failed to prove by clear and convincing evidence that the water rights appurtenant to Parcel 1 have been forfeited. The Engineer acknowledged that the Tribe introduced evidence that the parcel had been described as "bare land, prepared for cultivation" (based on interpretations of aerial photographs) in 1949, 1973, and 1977; simply as "bare land" (based on an infrared aerial photograph) in 1984; and as "bare land, buildings, and roads" in 1991. Another aerial photograph taken in 1993 showed no evidence of irrigation. Testimonial evidence indicated that the farm located on Parcel 1 was "in disrepair" and was "not organized or prepared for cultivation." The Tribe also introduced a map, prepared by the Bureau of Reclamation, which showed that Parcel 1 had not been irrigated in any of the years between 1984 and 1989.

The Engineer's ruling does not refer to any contrary evidence, yet he concluded that the Tribe had failed to establish by clear and convincing

evidence that the water rights appurtenant to Parcel 1 had been forfeited. In support of his conclusion, he wrote that there was no evidence of non-use in the years between the aerial photographs, that the Bureau map could be unreliable, that the aerial photographs may have been wrongly interpreted, and that the on-the-ground surveys were not performed frequently enough. In so concluding, the Engineer does not appear to have required only clear and convincing evidence. *See Albert H. Wohlers & Co. v. Bartgis,* 969 P.2d 949, 957 n.4 (Nev. 1999) (approving jury instruction describing clear and convincing evidence as "evidence which is beyond a mere preponderance of the evidence"); *accord Topaz Mutual Co., Inc. v. Marsh,* 839 P.2d 606, 609 (Nev. 1992). He appears to have demanded proof beyond a reasonable doubt, and perhaps even more than that. Our review of the Engineer's forfeiture rulings on other parcels suggests that his evaluation of the Tribe's evidence with respect to those parcels may also have gone beyond a requirement of clear and convincing evidence.

B. Abandonment

The Tribe argued before the Engineer that some of the water rights in question were abandoned under Nevada common law. As we have noted above, the Engineer ruled correctly that Nevada law does not include a legal presumption in favor of abandonment based on a showing of prolonged non-use. He then stated, with respect to water rights subject to abandonment:

> Permanent improvements, such as farm buildings, roads and canals, have been constructed on some of the parcels. The Tribe feels that prolonged non-use coupled with the existence of permanent improvements establishes abandonment of the water rights. However, the Tribe presented no evidence or testimony relating to the intent to abandon these water rights.

The Engineer noted that the Town of Fernley had "kept the rights in good

standing" by paying the applicable fees for water delivery, and that "no evidence in the record indicat[es] that any previous owner failed to pay the assessments or in any way displayed an intent to abandon or forsake these water rights." He then found that none of the water rights in question had been abandoned.

In appealing the Engineer's findings, the Tribe and the federal government argued that he failed to consider evidence of abandonment they had introduced. In particular, they argued that evidence of prolonged non-irrigation combined with evidence of improvements inconsistent with irrigation needs (for example, buildings) were sufficient to show that water rights appurtenant to a given parcel of land had been abandoned. The district court rejected their arguments, but did not review the evidence on a parcel-by-parcel basis in its order, stating only that the Engineer "did not ignore the Tribe's evidence."

The State Engineer's findings concerning abandonment are reviewed in federal court to determine whether they are supported by "substantial evidence." *See Revert v. Ray,* 603 P.2d at 264. We cannot determine from its order whether the district court reviewed the Engineer' s findings for conformity with Nevada abandonment law, as articulated by Nevada statutes and case law and by the district court in *Alpine IV.* We are also unable to review those findings because the evidence introduced in the proceeding before the Engineer has not been incorporated into the district court record that is now before us. We therefore remand for further proceedings. On remand the district court will have the opportunity to review, on a parcel-by-parcel basis, the evidence before the Engineer to determine whether it supports his findings on abandonment, and to include in the record the relevant evidence presented to the Engineer.

As with his forfeiture findings, we think it may be appropriate to comment briefly on the Engineer's abandonment findings. From his written findings, it appears that the Engineer may have misapplied Nevada's clear and convincing evidence standard in finding no abandonment, just as he

appears to have done in finding no forfeiture. For example, the Tribe and federal government introduced a substantial amount of circumstantial evidence showing that the water rights appurtenant to Parcel 10 had been abandoned. This evidence included aerial photographs taken in 1949, 1973 and 1977 showing that Parcel 10 was "bare land"; descriptions of the land in 1984 and 1991 indicating that it was not being used for agriculture; and a photograph taken in 1993 showing that the land had been converted to a residential subdivision. The Engineer nevertheless ruled that there was no "clear and convincing evidence" that the water rights appurtenant to Parcel 10 had been abandoned, even though there was no contrary evidence to show that those rights had ever been exercised. As with the Engineer's findings with respect to forfeiture, these findings appear to rest on a standard of proof higher than "clear and convincing evidence."

Conclusion

We reverse the decision of the district court and remand for further proceedings consistent with this opinion.

NOONAN, Circuit Judge, dissenting:

In 1902, the United States initiated the appropriation of the water rights here in dispute by the enactment of the Reclamation Act. *See Nevada v. United States,* 463 U.S. 110, 115-117 (1983). In so doing, the United States acted as trustee on behalf of the later individual owners of land within the Reclamation Project. *Id.* at 126. These water rights were consequently not subject to forfeiture and can now be transferred as the State Engineer and the district court ruled. In reaching the result it does, the majority silently but effectively departs from what the Supreme Court of the Umted States has already determined.

There cannot be any argument that when the United States began the Newlands Reclamation Project in 1902, it initiated the appropriation of the relevant water rights. Nothing prior to the enactment of the 1902 statute initiated the appropriation. Anything after 1902 merely carried out what had begun in 1902. This year was accordingly the priority date for

ownership of the water rights, and the Reclamation Act was the first step in establishing beneficial ownership of the water for the individual landowners. Their rights relate back "to the time when the first step was taken to secure [them]." *Ophir Mining Co. v. Carpenter,* 4 Nev. 534, 543-44 (1869). The water rights are not forfeitable "where the appropriations of the right have been initiated in accordance with law prior to March 22, 1913." Nev. Rev. Stat. § 533.085.

Why is it that the majority does not reach this conclusion? First, because it misinterprets *Alpine III*. That case was about vesting; this court reversed the State Engineers's erroneous determination that water rights had vested in 1902. *Alpine III,* 965 F.2d 731, 738 (9th Cir. 1992). When it was brought to the court's attention that the court had said nothing about the initiation of appropriation of rights (an issue not before it), the court amended its disposition to remand the question of initiation. *Alpine III, as amended,* 983 F.2d 1487, 1496 (9th Cir. 1993).

The majority engages in the speculation that the purpose of the Nevada anti-forfeiture statute was to exempt "investment-backed expectations." Nothing in the language of the statute evinces this purpose. Where initiation of appropriation is begun there is no investment. There is merely an assertion of title. As the anti-forfeiture statute protects both vested rights and the first tentative step to vesting, there is no reason to attribute to the statute a purpose to protect investment.

The majority admits that in 1902 "the United States initiated the water rights for the entire Newlands Project." The majority's second error is implicitly to suppose that the Nevada legislature used "initiation of appropriation" to mean something different from the first step in the process of acquiring a water right. It makes perfect sense for the Nevada legislation to protect the Nevada individuals for whom the United States acted. It makes no sense to suppose with the majority that initiation of appropriation means one thing for purposes of priority and a very different thing for purposes of protection from forfeiture under § 533.085.

I concur with the court in its ruling on abandonment. I believe that its ruling on forfeiture misinterprets *Alpine III*, Nevada law, and what is at least implicit in *Nevada v. United States, supra.*

U.S. DISTRICT COURT DISTRICT OF NEVADA ENTERED & SERVED MAY 14, 1999

CLERK, U.S. DISTRICT COURT, BY S/_____

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OFAMERICA,

Plaintiff,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

V.

ORR WATER DITCH DO., et a!.,

Defendants.

Matter of Nevada State Engineer Ruling No. 4116, re: Application 56226

Case No. (Equity) A-3-LDG

ORDER

The Pyramid Lake Paiute Tribe of Indians (the Tribe) and the United States of America (collectively the Appellants) each appeal the Nevada State Engineer's Ruling No. 411 6 (#62, #63). The State Engineer, the Town of Fernley, and the Truckee-Carson Irrigation District (Irrigation District) have filed oppositions, and the United States and the Tribe have replied.

Brief Factual Background

On July 2,1902, the United States commenced the Newlands Reclamation Project, withdrawing over 200,000 acres of land in the vicinity of Fallon, Nevada. With due diligence,the United States thereafter commenced and proceeded with the construction of the related irrigation

works necessary to irrigate this land. Initially, and pursuant to the Reclamation Act, Project water was intended to be used primarily for irrigation, but could also be used for watering livestock and for domestic purposes. In 1990, Congress enacted the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Public Law 101-618 §200 eta!., (the Settlement Act). Section 209(a) of the Settlement Act expressly permitted Project water to be used for municipal purposes.

Fernley purchased water rights to about 280 acre-feet of Project water from various landowners and applied to the State Engineer to change the manner and place of use of these newly purchased water rights from irrigation to municipal use. The United States and the Tribe protested Fernley's application. Following briefing, a hearing, and post-hearing briefs, the State Engineer approved Fernley's application. The parties have briefed this matter and the matter is now before the Court.

Issues on Appeal

Stated succinctly, the Appellants raise the following issues on appeal.

1. Whether the State Engineer erred in failing to recuse himself?

2. Whether the State Engineer erred in not requiring approval of the Secretary of the

Interior as a prerequisite to any approval by the State Engineer?

3. Whether the Secretary of the Interior allocated water rights to each of the existing places of use identified on Fernley's Application?

4. Whether the State Engineer erred in finding that the water rights purchased by Fernley are currently valid? Stated otherwise, did the State Engineer err in finding that the subject water rights had been perfected, were not abandoned and were not subject to forfeiture?[1]

---

[1]In its moving papers, the United States also raised an issue whether the State Engineer erred by allowing the

In considering these issues, the Court presumes that the State Engineer's factual findings are correct, with the burden to show otherwise resting upon the party attacking the State Engineer's ruling. N.R.S. § 533.450(9). This Court reviews whether the findings are supportedby substantial evidence and determines whether the State Engineer's findings are an abuse of discretion. *Town of Eureka v. State Engineer,* 108 Nev. 163, 165 (1992). This Court does not weigh the evidence or substitute its opinion for that of the State Engineer. The State Engineer's interpretation of law is reviewed de novo. *Id.*

Recusal of State Engineer

Both Fernley and the State Engineer argue that the Tribe cannot raise this issue on appeal because it failed to properly raise this issue below. The Tribe counters that it properly raised this argument to the State Engineer at a pre-hearing status conference, but that the State Engineer failed to address the issue in his ruling.

A review of the transcript of the pre-hearing status conference indicates that the Tribe stated that it was raising its "standing motion" to disqualify the State Engineer. In response, the Hearing Officer stated that the motion should be raised at the hearing, not the status conference. The Hearing Officer further noted that the Tribe intended to move to recuse the State Engineer at the hearing and that he would consider a motion to recuse made during the hearing. However, the Tribe did not follow through on its intention; it did not move to recuse the State Engineer during the hearing. Accordingly, the Tribe waived its right to argue that the State Engineer should have recused himself by failing to properly raise the motion during the hearing below.

Approval of the Secretary of the Interior

---

transfer of the full water duty of 4.5 acre-feet per acre. At oral arguments, however, the United States formally withdrew this issue.

The United States argues that the approval of the Secretary of the Interior is a prerequisite to the State Engineer's approval of the proposed transfer and change of use of the Project water rights at issue. In his ruling, the State Engineer stated only that, prior to changing the manner and place of use of the water, Fernley must comply with applicable federal law.

The United States offers two theories in support of its argument. First, the Government asserts that its approval is required because it is the "legal owner" of the water rights. Second, the Government suggests that §209 of the Settlement Act requires that Fernley obtain the Secretary's approval of the proposed change before seeking the State Engineer's approval.

In response, Fernley, the Irrigation District, and the State Engineer suggest that the United States does not have any ownership interest in the water rights. Alternatively, if the United States does have an ownership interest, such interest is "at most minimal" and does not include a right to prohibit the beneficial and equitable owner of the water right from changing the place and manner of use pursuant to state law. These parties also point out that the United States has failed to identify any statute or other provision of law that either expressly requires the approval of the Secretary or requires that approval prior to the State Engineer's approval of the transfer application.

The United States' argument fails for several reasons. First, the United States' ownership rights in the water rights at issue are "at most minimal." *Nevada v. United States,* 463 U.S. 110, 126 (1983). These "minimal" ownership rights do not provide the United States the right to require the beneficial and equitable owner of a water right seeking to transfer the water right to obtain the approval of the United State prior to seeking the approval of the State Engineer. Second, the State Engineer did not rule that it was not necessary for Fernley to obtain approval from the United States. Rather, he ruled that Fernley was required to comply with all federal law regarding the proposed transfers.

Third, §209 of the Settlement Act fails to provide support for the United States' position. Nothing in the language of §209 expressly requires that a beneficial owner of a water right first obtain the approval of the Secretary before submitting a transfer application to the State Engineer. Rather, §209 more appropriately appears to be an expression by Congress that the United States has consented and approved beneficial owners of Newlands Project water rights changing the manner of use of their water right from irrigation to municipal uses. Finally, the Court notes that the United States has not indicated the procedure by which an owner of a Project water right is to obtain the consent of the United States prior to seeking the State Engineer's approval to transfer the place of use. In total, the Court finds that the State Engineer did not err in ruling that Fernley was required to comply with all applicable federal law prior to actually changing the manner and place of use of the water rights at issue.

Allocation of Water Rights to the Places of Use Identified in Fernley's Transfer Application.

The United States argues that Fernley failed to establish that the specific water rights they purchased were appurtenant to specific Project land. Although the Government generally raises this issue as to Parcels 1 - 5, 7 - 1 2, and 1 5 - 28, its arguments are premised only upon the water rights deed related for Parcel 16. As such, the Court will consider the United States' argument only as to Parcel 16.

The Government's argument is not based upon evidence admitted at the hearing before the State Engineer. While a witness testified at the hearing that the water right deed for Parcel 16 identified the specific land to which rights were appurtenant, none of the parties offered the deed itself as evidence. Rather, only after the hearing did the United States first examine the water rights deed for Parcel 16. As a result of this belated examination, the United States concluded that the deed does not specifically identify the appurtenant land. Given that the United States failed to argue or present any evidence on this issue to the State Engineer,

the Court cannot find error in the State Engineer's ruling.

Current Validity of the Water Rights

State Engineer's Conclusion that Nevada's Forfeiture Statute Does Not Apply

The threshold question before the Court is whether the State Engineer correctly found that each of the individual water rights vested on July 2, 1902. Having carefully reviewed the entire record, and the history of the Orr Ditch litigation, the Court finds that the State Engineer did not err. In the Orr Ditch Final Decree, the court awarded a July 2, 1 902, priority date for all individual water rights within the Newlands Project governed by the Decree. Accordingly, as the July 2, 1 902, priority date is the law of the case, the State Engineer could not err when he applied this priority date in considering these change-of-use applications. Further, this conclusion is consistent with the Supreme Court's decision in *Nevada v. United States,* 463 U.S. 110 (1 983), in which the Court determined that all water rights for the Truckee were adjudicated by the Orr Ditch Final Decree. Finally, finding that each individual Project water right has a July 2, 1 902, priority date is consistent with water law in general, and with Nevada water law in particular.

Proper resolution of the issue whether the State Engineer erred requires recognition that the priority of water rights, including Project water rights, was a core issue in the Orr Ditch litigation from the filing of the original complaint. The United States initiated the litigation in 1913, "as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to the water of the Truckee. and required all parties to fully set up their respective claims." *Nevada,* 463 U.S. at 120. The United States expressly alleged that it sought a judicial resolution of the priority of water rights for the Truckee River. As stated by the Government in its amended complaint,

> Until the several rights of the various claimants, parties hereto, including the United States, to the use of the

> waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, and order in time of each right to divert said waters from said river and its tributaries has been judicially determined the United States cannot properly protect its rights in and to the said waters, and to protect said rights otherwise than as herein sought if they could be protected would necessitate a multiplicity of suits.

Amended Complaint (emphasis added). Further, as noted by the Supreme Court, "the primary purpose of the Government in bringing the Orr Ditch suit in 1913 was to secure water rights for the irrigation of land that would be contained in the Newlands Project. ..." *Nevada,* 463 U.S. at 121.

The United States, in essence, asked the court in 1913 to place every user of Truckee River water in a line and, when placing those users in the line, to place them in the order that they were allowed to take water.[2] The benefits of creating such a line are obvious. First, those persons standing in line will be limited to only those users who have already obtained, or who are in the process of obtaining, a right to take water. All other persons wanting to take water, but who had not yet commenced the process of obtaining a right to take water, would have to go to the end of the line when they started the process of appropriating water. Second, the water users placed at the front of the line would be secure in the knowledge that they would get water from the river in even the driest of years. In contrast, although users placed at the back of the line would have

---

[2]The Court recognizes that stream adjudications are more complex than this simple model, involving other issues such as the place of diversion and the nature and manner of use. However, for present purposes this model is sufficient to serve as a conceptual aid in resolving the issue of the priority of the individual Project water rights.

less assurance of receiving water in dry years, these lower priority users could plan accordingly. In short, the creation of the line allows all users of the river water to rely on the line, and their relative placement in line, to plan their individual activities. Third, and as a result of the above, each water right gains a relative value according to a user's place in line. For example, persons that did not have a place in line, but who wanted to purchase a spot in line, would know that a water right at the front of the line would be more valuable than a water right at the back of the line. Similarly, those at the front of the line would know that their rights would be sought after by persons wanting to obtain water rights.

Each of these factors is revealed in the United States' complaint initiating the stream adjudication. First, the United States sought to secure spots in the line on behalf of the Tribe and the Newlands Project that it had initiated in 1902. Second, the United States would obtain a spot for the Tribe near the front of the line, while it would obtain a spot on behalf of the Newlands Project only slightly further back. Both of these positions were sufficiently close to the front of the line, however, that the Tribe and the farmers in the Project would be assured of obtaining water every year. Finally, by gaining a favorable placement for water designated for the Newlands Project, the United States ensured the likelihood of success for the Project. Farmers buying land from the United States within the Project would also be purchasing the water right appurtenant to the land that would permit the farmers to stand near the front of the water line, a right essential to the successful farming of the land. (Indeed, given the arid conditions of the region, land is effectively useless for farming if the land lacks a water right.) Each of these benefits was realized when, in 1 940, the court entered the Orr Ditch Final Decree judicially recognizing and creating a line for Truckee River water, and finally determining each and every user's place in that line.

The value of judicially forming and recognizing a line for water, and the reliance of all water users on the judicial recognition of that line, is

sufficiently great that the Supreme Court has held that even those persons who were not standing in the line created by the Orr Ditch Final Decree nevertheless have standing to enforce the Decree. In *Nevada,* the Tribe filed a complaint seeking to obtain an additional place near the very front of the Orr Ditch water line for an implied-reservation-of-water to maintain the Pyramid Lake fishery. The Supreme Court held that the Tribe's complaint was precluded by. res judicata. Every place in the line, the Supreme Court noted, including a spot for the Tribe's implied-reservation-of-water right for fishing, was litigated in the Orr Ditch litigation. Further, the Supreme Court held that even post-Final Decree appropriators, those persons who did not take a place in the Orr Ditch line until after the line had been judicially recognized by the Decree, could enforce the Final Decree as against the Tribe. As a result, if the Tribe wished to divert additional water to maintain the fishery, it would have to go not merely to the end of the line as judicially recognized in the Final Decree, but would also have to stand in line after every post-Decree appropriator. Thus, by judicially creating and recognizing the line, every person standing in the line has the right to enforce the line and to stop non-righted water users from cutting into line.

In addition, every person standing in line can enforce the line by removing users who lose their right to use water from the line. Indeed, the effort to remove users from the Truckee water line is at the heart of the present review. In recent years, including the present matter, the United States and the Tribe have engaged in an effort to remove from the water line every user who has allegedly lost his right to stand in line. With each user removed from the line, the line becomes shorter and the possibility of obtaining water by users standing at the end of the line is increased. Presumably, after *Nevada,* the Tribe has placed itself, or is seeking to place itself, as one of the those users at the end of the line waiting for Truckee River water.

One method of removing a user from a water line is to show that

the user has lost his spot in the line by forfeit. A water right, that is, a spot in the water line, is forfeited when the owner of that right fails to exercise his right to take water for five consecutive years, regardless of whether the owner intended to give up his spot in line to take water. Under Nevada law, however, only those spots in line after the critical date of March 22, 1913, are subject to forfeiture. *In Re Waters of Manse Springs,* 60 Nev. 280, 290, 108 P.2d 311 (1940). Any spot in line prior to March 22, 1913, is subject only to abandonment. Unlike forfeiture, to remove a user from the water line for abandonment requires showing not only that the user has not taken water, but that the user intended to abandon his spot in line. Thus, given the less-onerous and burdensome nature of showing forfeiture, the Tribe and the United States would prefer to attempt to remove users for forfeiture. Nevertheless, the Tribe and the United States can seek to apply forfeiture to a user only if that user's place in line is behind March 13, 1913, and therefore subject to forfeiture.

The preference to remove users by forfeiture explains the Tribe's and the United States' argument that the State Engineer erred when he found that every individual Project landowner has a priority of July 2, 1902. In terms of the analogy to the water line, the State Engineer concluded that each farmer was standing in line on the July 2,1902, spot that the United States obtained on behalf of the farmers for the specific and express purpose of irrigating the Project farm lands. The State Engineer's finding effectively precludes the Tribe and the United States from removing any Project landowner under the forfeiture standard. In this review, the Tribe and the United States assert that the State Engineer should have placed the individual farmers onto the spot corresponding with the date they took their first step to obtain a water right-to obtain a spot in the line-from the United States. The appellants expect that, when the individual users are placed in line according to the date they first sought a water right from the United States, many of the farmers will be placed behind the critical March 22, 1913, spot.

The argument that the State Engineer erred in placing the individual Project landowners on the July 2, 1902, spot, however, assumes that the farmers were not already standing on that spot pursuant to the Orr Ditch Final Decree. The assumption does not withstand scrutiny. Admittedly, the Final Decree does not expressly identify any Project farmer or landowner by name, or expressly assign a specific water right or priority date to any individual Project landowner. Neither does the Final Decree refer to individual Project water rights. Although the farmers are not expressly named or otherwise identified in the Orr Ditch Final Decree, each farmer has obtained a right to stand in line from the United States. In effect, the United States transferred to each landowner a portion of the right to stand in the Orr Ditch water line that the court awarded to the United States. In turn, as relevant tothe Newlands Project, the United States obtained its right to stand in line pursuant to Claim No. 3. As awarded in the Orr Ditch Final Decree,

> Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1 866, the [United States] is entitled and allowed to divert, with a priority of July 2, 1 902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project....

Orr Difch Final Decree, at 12. This language is clear, the United States was given a July 2, 1902, spot in line to divert water at the rate of 1500 cubic feef per second for the irrigation of Project lands.[3] The United States then transferred, (and had already transferred), portions of its July 2,

---

[3]The award in Claim No. 3 also recognized other beneficial uses to which the diverted water could be applied. None of these other uses, however, is relevant to the present discussion.

1902, spot in line to individual Project farmers so that they could actually receive water and irrigate the Project lands, as required by the award. Thus, as each individual landowner claims his right to stand in line pursuant to the award of that right in Claim No. 3, each landowner benefits from the awarded priority date of July 2, 1902.

The language of the Final Decree provides further evidence that each Project landowner is already standing on the July 2, 1902, spot in the Orr Ditch water line. The water rights awarded in Claim No. 3 are expressly "for the irrigation of 232,800 acres of lands on the Newlands Project," and other beneficial uses. As Congress recognized in the Reclamation Act, "beneficial use shall be the basis, the measure, and the limit of the right" to use water acquired under the Act, including the Newlands Project. Just as beneficial use is the measure of the extent of a water right, a user can stand in line and divert water only if the water diverted will be placed to beneficial use. This concept is not surprising. Water that is diverted but not placed to a beneficial use is wasted, precluding its beneficial use by another user standing farther back in line who would not otherwise receive water. Only those persons that beneficially use water have the right to stand in line. In this case, the beneficial users of Project water are the Project landowners, not the United States; the Project landowners apply the water that is diverted to irrigate Project land. Absent the Project landowners and otherapproved users of Project water, the water diverted pursuant to Claim No. 3 would be wasted. Thus, in contrast to the United States' "at most minimal" right to the July 2, 1 902, spot in line, the Project landowners clearly stand on that spot as the beneficial users and owners of the water rights, allowing them to receive the water that the Orr Ditch Final Decree designated for the irrigation of Project lands.

Finally, and perhaps most significantly, both the United States and the Tribe are expressly enjoined by the Orr Ditch Final Decree from asserting that the individual Project landowners have a priority date other

than July 2, 1 902. As recognized by this Court in the Orr Ditch Final Decree, the Decree binds not only the original parties to Orr Ditch litigation,but also binds any and all persons claiming a water right adjudicated by the Final Decree.

> That the parties, persons, corporations, interveners, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and *each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or irs tributaries, or the waters of any of the creeks or streams or other waters hereinbe fore mentioned except the rights specified, determined and allowed by this decree..."*

Orr Ditch Final Decree, at 10 (emphasis added). The Supreme Court has specificallyrecognized that the Decree is binding upon not only the United States, but also the Tribe andthe Project landowners. "We hold that under the circumstances described above, the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the Orr Ditch suit." Nevada, 463 U.S. at 143. In this case, all parties, including the Tribe and the United States, are enjoined from asserting that the water rights being exercised pursuant to Claim No. 3 have a priority other than July 2, 1 902. Indeed, even the Project landowners are enjoined from asserting that the priority date for their water rights is other than July 2, 1 902. Stated simply, the Final Decree enjoins all users of Truckee water from disputing or arguing that those persons who take water pursuant to Claim No. 3, which includes the individual Project landowners whose rights are at issue in this matter, are

not standing on the July 2, 1902, spot in line. Thus, the Court finds that the State Engineer did not err in finding that each individual Project water right has a priority of July 2, 1902.

Nevertheless, the Court is cognizant of the several arguments that have been raised suggesting that the priority date for individual Project water rights has not been determined. One such argument is that the priority date for individual Project water rights should be measured from the date that the individual Project farmers took the first steps to obtain water from the United States. In essence, the argument is made that Project landowners taking irrigation water pursuant to Claim No. 3 should not be placed on the July 2, 1902, spot that the United States obtained for the purpose of irrigating Project land, but should be placed elsewhere in line.

The United States initiated both the Orr Ditch litigation and the Alpine litigation for the express and specific purpose of securing a priority date, a spot in line, that it would be transferring to individual farmers. As has been discussed above, the Orr Ditch Final Decree granted the relief sought by the United States, awarding a July 2, 1902, priority date for the irrigation rights within the Newlands Project, which award is binding upon all users of Truckee River water, including the United States, the Tribe, and the individual farmers.

In the Alpine litigation, the court's placement of the individual Project landowners onto the July 2, 1 902, spot in line is even clearer. The court awarded the July 2, 1 902, priority date to the individual Project land owners as follows:

> The water rights on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project. These rights have a priority of July 2, 1902. The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lien-holder's interest to secure

repayment of the project construction costs.

United States v. Alpine Land & Reservoir, 503 F.Supp. 877, 879 (D.Nev. 1980). That this holding was not challenged, and thus became final, is not surprising since the parties to the Alpine litigation agreed, before trial, that the priority date of the individual Project landowners' water rights was July 2, 1902. *Id.,* at 885. In effect, all parties, including the United States and the Tribe, agreed to resolve a core issue of the Alpine litigation, as alleged by the United States in its complaint, as to where the individual farmers were standing in the line for Carson River water.

The suggestion remains, however, that the Alpine Court's final judgment awarding the farmer's a July 2, 1 902, spot in line somehow did not resolve the issue of the farmer's proper place in line, because the parties settled rather than litigated this core issue. This Court is extremely concerned by the suggestion, as it calls into question the validity of every final judgment this Court has entered as a result of the parties settling, rather than litigating, claims alleged in the complaint. As in the Orr Ditch litigation, the United States initiated the Alpine litigation to finally resolve the dispute as to each Project farmer's place in line for Carson River water. The parties agreed to the July 2, 1902, priority date for the very purpose of resolving this claim.

The Court recognizes that the suggestion, (that the parties' settlement agreement did not resolve the issue of the farmer's proper place in line), arises from the fact that the agreed-upon priority date of July 2, 1902, was also material in resolving **another** of the United States' claims brought in the Alpine Complaint: each farmer's water duty, the amount of water to which each farmer was entitled. The United States argued that the water duty was governed by the 1903 Cooperative Act. The trial court noted, however, that the 1903 Cooperative Act did not apply because the water rights for individual farmers had priority dates of July 2, 1902, as stipulated by the parties before trial. If this stipulation is considered only

in the context of the United States' water-duty claim, (thereby ignoring the context of the overall litigation, including the United States' priority claim), then one can reach the erroneous conclusion that the parties agreed to the priority date solely for the purpose of resolving the applicability of the 1903 Cooperative Act to the amount-of-water dispute. In turn, this leads to the incorrect suggestion that the Project landowner's place in line was not resolved by the Alpine Final Decree.

Nothing in the record of the Alpine litigation indicates that, in agreeing upon a priority date, the parties did not intend to actually resolve the core issue of the landowner's priority. Similarly, the record of the Alpine litigation lacks any suggestion that the sole purpose in reaching this agreement was to resolve whether the 1 903 Cooperative Act governed the amount-of-water dispute. The Court cannot find any agreement or language in the Alpine record indicating that the parties intended to reserve litigation of the issue of priority despite agreeing that the priority date was July 2, 1902. Further, this Court cannot discern any language in the Alpine Final Decree indicating that, in accepting the parties' settlement agreement, the Alpine trial court believed that the parties were not resolving the core issue regarding the correct priority date for Project landowners. Instead, the Alpine Final Decree indicates that the parties agreed to the Project landowner's priority date for the purpose of resolving the issue of the priority date. That the priority date was also relevant to the trial court's resolution of another claim raised by the United States in its complaint-the extent of each Project landowner's water duty-does not render the agreement meaningless on the issue that the parties intended to resolve when they entered into the stipulation: the priority date for each farmer's water right.

Project-Wide Rights

The Court would also note the suggestion that, as regards Project water rights, the Alpine and Orr Ditch Final Decrees determined only project-wide rights. Pursuant to this suggestion, individual rights,

including individual priority dates for water rights within the Newlands Project, have not yet been determined. This suggestion appears to be based upon the following language from *Alpine II*:

> The governing decrees resulting from these proceedings [the Orr Ditch and Alpine litigations] deal with the Project as a whole. While these previous proceedings have settled many issues, they have not determined whether the particular Project properties involved in this case are entitled to receive Project water.

878 F.2d at 1220-21. While this observation is correct, the suggestion that priority dates have not been determined rests upon an impermissible extrapolation of this observation. Whether particular Project property is entitled to receive water requires resolution of the question, "Does a water right exist for this specific piece of Project land?" The appellate court correctly observed that this question has not yet been answered. In contrast, the priority date of a water for a particular Project property requires resolution of a very distinct question, "If a valid water right exists for a particular property, what are its parameters?" The suggestion that the priority date has not been determined confuses these very distinct questions. Indeed, neither the Orr Ditch nor the Alpine Decree could appropriately answer the former question as to the existence of a right for specific Project property.

The United States filed its complaints on behalf of the Project farmers. This limited the United States to seeking determinations of only those issues applicable to the water rights of all Project farmers such as the priority date and the water duty. As shown by the allegations of the complaint, and as established in the Decrees, these issues were litigated and resolved. In addition, resolution of these issues was beneficial to all non-Project water users. Non-project users would know the maximum amount of water that could be appropriated by Project farmers, and would

the spot where the Project farmers' stood in the water line.

In contrast, resolution of the question whether a water right exists, whether a farmer has the right to stand in line for a specific piece of Project land, depends primarily upon three factors. Recognition of these three factors shows that the question whether a right actually existed for a particular piece of Project property, as opposed to the question of the parameters of Project water rights, could not be adequately resolved by either Decree. First, the existence of a water right requires a determination whether a Project farmer obtained, from the United States, a right to stand in line for the specific Project property. As noted in *Alpine II*, "[It]he rights of particular properties to receive Project water are based on contracts and certificates issued by either the Secretary or the Truckee-Carson Irrigation District (TCID)." While this issue might have been resolved as to some properties in the Decrees, the Court notes that both the Orr Ditch and the Alpine litigations were initiated while the United States was still in the process of transferring water rights. As a result, resolution of whether the farmer had obtained a valid water right for particular Project property was premature as to most of the Project properties when the United States filed its complaints. Further, the identity of the specific pieces of property that would receive water was not critical or relevant as to non-Project users standing in line for water. Critical to non-Project users of Truckee water was the determination of the maximum amount of water that could be diverted by Project farmers, and the priority date pursuant to which the farmers could divert that amount of water. The Orr Ditch Decree provided this critical information as 1500 cfs of water with a priority of July 2, 1902. The Alpine Decree provided this critical information as 3.5 or 4.5 afa for those properties that, as of 1 980, had obtained a valid right to water from the United States, with a priority of July 2, 1902.

The second factor in determining whether a valid water right exists for a particular piece of property is whether the right has been, or is in the process of being, timely perfected. "When any work is necessary to be

done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it." *Ophir Mining Co. v. Carpenter,* 4 Nev. 534, 543-544 (1869). As the United States did not apply water to land, every farmer who obtained a water right from the United States was required to perfect the water right awarded to the United States by actually applying water to land, beneficially using the water to irrigate crops. As with the question whether a farmer obtained a water right from the United States, a determination of the issue whether each farmer perfected his right would be premature as to many particular pieces of Project property. In addition, determination whether a right had been perfected was not necessary to the resolution of the Decrees. As relevant to those users standing in line behind the farmers, the Decrees established the critical and essential parameters of any water right: the water duty and the priority date for each Project farmer.

The third factor relevant to a determination whether a valid water right exists for specific Project property is whether a perfected right has been abandoned or forfeited. This factor queries whether the farmer, after obtaining a right to stand in line from the United States, and after perfecting that right by actually standing in line and taking water, has left the line? Again, given the nature of this factor, it could not have been considered in either Decree. Neither Decree could predict which farmers would abandon or forfeit their rights, and when those rights would be abandoned. A valid water right that existed in 1910 or 1920 might cease to exist in 1 985, after both Final Decrees had been entered. While the Orr Ditch and Alpine Decrees could not resolve whether a water right existed for a particular Project property, both Decrees could resolve the parameters of the water rights sought by the United States on behalf of the farmers. Specifically, the United States sought a determination of the water duty and the priority date, the critical parameters of any water right.

As noted above, both Decrees resolved these parameters as 3.5 or 4.5 afa of water, with a priority of July 2, 1902.

Treating Project Farmers as Obtaining Water from Source

Another argument that has been articulated is that, in determining a priority date for individual Project water rights and applying the relation back doctrine, the Court should engage in a legal fiction that the Project farmers obtained their water rights from the source, rather than from the United States. The argument fails, however, because it ignores that the source of the water diverted and used by the farmers is the Truckee River. As noted above, the Truckee river was subject to a full stream adjudication initiated by the United States. This adjudication resolved, as of 1940, the water duty and priority date for all existing rights to water, perfected or inchoate, whose source was the Truckee River system. Accordingly, res judicata precludes both the Tribe and the United States from arguing that the farmers should be treated as if they appropriated their water directly from the Truckee, rather than as a transfer from the United States. As to the priority date for Project water rights, the parties could have argued, during the litigation of the United States' Orr Ditch complaint, that the court should adopt the unique legal fiction that the Project farmers had appropriated water directly from the Truckee instead of from the United States. As this legal theory was not raised during the stream adjudication determining the priority date of Project water rights; the parties are precluded from raising the argument in this review of transfer applications.

The Court finds that the State Engineer did not err in recognizing that the priority date for all individual Project water rights, as established by the Orr Ditch Final Decree, is July 2, 1902. Accordingly, none of the water rights at issue are subject to forfeiture.

Whether the State Engineer Ignored Clear and Convincing Evidence of Intentional Abandonment.

The Tribe argues that, as to Parcels 1 and 10, the evidence indicated that these parcels contained buildings precluding irrigation for

three years. The Tribe suggests the State Engineer erred by ignoring "the obvious implication" that the permanent structures evidenced an intent to abandon a portion of the water right on these parcels. The Tribe further argues that the State Engineer should have considered the combination of non-use and the presence of buildings as meeting the Tribe's burden of showing that the water right had been abandoned. As noted in footnote 8 in *Alpine III,* Nevada has not recognized that a prolonged period of non-use raises a rebuttable presumption of abandonment. *Alpine III,* 983 F.2d at 1494. Thus, while evidence of non-use and the presence of buildings may be some evidence of an intent to abandon, such evidence standing alone does not require a finding of abandonment. In his ruling, the State Engineer did not ignore the Tribe's evidence, but clearly found that the Tribe presented evidence both of prolonged non-use and of buildings on the property. In light of this finding, the Court cannot agree with the Tribethat the State Engineer did not consider the non-use and presence of buildings, either singly or in combination, in considering whether the Tribe met its burden of showing an intent to abandon.

The State Engineer's ruling is AFFIRMED.

DATED this 11th day of May, 1999.

S/_____

Lloyd D. George

United States District Judge

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF PROTESTED APPLICATION 56226, FILED TO CHANGE THE MANNER AND RULING PLACE OF USE OF THE WATERS OF THE TRUCKEE RIVER HERETOFORE DECREED IN THE ORR DITCH DECREE, STOREY COUNTY, NEVADA.

RULING # 4116

GENERAL

I.

Application 56226 was filed on April 24, 1991, by the Town of Fernley, to change the manner and place of use of 280.78 acre feet,[1] a portion of the waters heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree*.[2] The Town of Fernley wishes to change the manner of use from the decreed use of irrigation, storage, power, domestic and other purposes to municipal use and to change the place of use to the Fernley utilities water service area. The point of diversion would remain at Derby Dam, located within the N ½ SW 1/4 Section 19, T.20N., R.23E., M.D.B.&M.[3]

II.

Application 56226 was timely protested by the U.S. Bureau OT

---

[1]The original quantity of water requested to be changed under Application 56226 was 282.26 acre feet. During the hearing, the Applicant withdrew Parcel No. 6, in the amount of 1.48 acre feet, leaving the amount under Application 56226 to be 280.78 acre feet.

[2]Final Decree in *United States v. Orr Water Ditch Co.*, In Equity, Docket No. A-3. (D. Nev. Sept. 4, 1944).

[3]Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 25, 1993.

Reclamation (Bureau) on the grounds that:

The granting of this application could have detrimental effects on the operation of the Newlands Project by:

1. Reducing the amount of water available to project water users.
2. Reducing the conveyance efficiency of the project
3. Other possible impacts of the proposed change in manner of use and place of use of project water.

The Bureau of Reclamation requests that Application 56226 be denied.[4]

III.

Application 56226 was also timely protested by the Pyramid Lake Paiute Tribe of Indians (Tribe) on the grounds that:

1. Pursuant to federal reclamation law, 43 U.S.C. § 389, said application requires the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said application by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; and (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery.

3. Granting or approving the above referenced application by

---

[4]Exhibit No. 25, Public Administrative Hearing before the State Engineer, May 25, 1993.

the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicants do not have vested rights to use the waters of the Truckee River on the proposed places of use described in their applications.

4. Granting or approving the above referenced application by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened.Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

5. On information and belief, said application involves the transfer of an alleged water right that was never perfected in accordance with federal and state law. Such an alleged water right cannot and should not be transferred.

6. On information and belief, said application involves the transfer of alleged water rights that have been abandoned or forfeited. Such alleged water rights cannot and should not be transferred.

7. On information and belief, said application should be denied because it would increase the consumptive use of water within the Newlands Project and/or increase the amount of water that is diverted to the Project from the Truckee River.

8. On information and belief, said application involves the proposed transfer of alleged water rights from land that is not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands.

9. The application should not be approved because the applicants have not entered into a repayment contract with the United States.

10. The application should not be approved because the proposed use of the Newlands Reclamation Project's water rights is not authorized by federal law.

11. The application should not be approved because the proposed place of use is not within the authorized service area or boundaries of the Newlands Reclamation Project.

12. The application violates the provisions of Nevada law which protect the endangered cui-ui.

13. The application should not be approved because the applicant has not obtained permission of use federal facilities for the transportation of the water it is seeking to obtain and transfer.

14. On information and belief, the water right that is the subject of the application was obtained from a Newiands Project water user who has violated the rules and regulations of the Secretary of the Interior applicable to the Newlands Project. The Truckee-Carson Irrigation District also has violated and is continuing LO violate those rules and regulations. Approval of the application therefore would violate the Order, Judgement and Decree entered in the case of *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F. Supp. 252 (D. D.C. 1973)

15. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced application is granted because: (i) it will result in greater diversions of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) it will prevent the adequate enforcement and encourage the continued violation of the Operating Criteria and Procedures for the Newlands Reclamation Project; and (iii) it will imDair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and

preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

THEREFORE the protestant requests that the above rererenced application be denied and that an order be entered for such relief as the State Engineer deems just and proper.[5]

IV.

On January 15, 1993, a Pre-Hearing Conference was held in the matter of protested Application 56226. The Truckee-Carson irrigation District (TCID) requested and was granted the status of an intervenor.[6]

V.

An administrative hearing before the State Engineer was held on May 25, 1993.[7]

FINDINGS OF FACT

I.

In addressing change applications, the Orr Ditch Decree sets forth the procedure to accomplish changes in the point of diversion, manner and place of use.

The Orr Ditch Decree provides at page 88, that:[2]

> Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion, and the place, means, manner or purpose of use of the waters to which they are 50 entitled or of any part thereof, so far as

---

[5]Exhibit No. 26, Public Administrative Hearing before the State Engineer, May 25, 1993.

[6]Transcript pp. 35-56, Pre-Hearing Conference before the State Engineer, Januar.y 15, 1993.

[7]Exhibit No. 1, Public Administrative Hearing before the State Engineer, May 25, 1993.

they may do so without injury to the rights of other persons whose rights are fixed by this decree.[8]

The State Engineer finds that change Application 56226 is properly before him for consideration and decision.

II.

The protestant Tribe requested that evidence and testimony presented by the Tribe at the previous hearings on the Newlands Project applications be included in the record on Application 56226.[9] This request was opposed by the Applicant on the grounds that it was not a party to any of the previous hearings.[10] At the hearing, all parties attempted to make this record complete and independent of any previous hearings. The State Engineer finds that this record is complete and that the record of previous hearings will not be included in this record.

III.

The Bureau raised the issue of ownership of the water rights requested to be changed by Application 56226 and contended that the

---

[8]Recently, the Ninth Circuit Court of Appeals interpreted this controlling provision. The Court concluded that "the manner provided by law" means "[njot only state water law substance, therefore, but procedure as well governs Orr Ditch water rights.' *United States v. Orr Water Ditch Co.*, 914 P.2nd 1302, 1307-1303 (9th Cir. 1990).

[9]Exhibit No. 8, Public Administrative Hearing before the State Engineer, May 25, 1993.

[10]Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 25, 1993.

Applicant had failed to establish a claim of ownership of these rights.[11] The Bureau did not present any evidence or testimony that any other party owned these water rights. Later, the Bureau accepted the Town of Fernley's assertion that it had acquired these rights.[12]

The Applicant submitted evidence[13] and testimony[14] which shows the Town of Fernley paid the operation and maintenance fees or these water rights that are charged by TOID. The Applicant's testimony revealed that all of the water rights are owned by the Town of Fernley.[15] Additionally, TCID, who keeps the ownership records for the water rights within the Newlands Project, certified to the State Engineer that deeds are on file for these water rights that transfer ownership to the Town of Fernley.[16] The State Engineer finds that the owner of the water rights requested to be changed by Application 56226 is the Town of Fernley.

IV.

The protestant Tribe claims that some of the water rights requested to be changed by Application 56226 have been forfeited.[5] A recent decision of the Ninth Circuit Court of Appeals provides guidance as to

---

[11]Transcript p. 42, Public Administrative Hearing before the State Engineer, May 25, 1993.

[12]Post Hearing Brief filed by the U.S. Bureau of Reclamation, July 29, 1993.

[13]Exhibit No. 24, Public Administrative Hearing before the State Encineer, May 25, 1993.

[14]Transcript pp. 323-326, Public Administrative Hearing before the State Engineer, May 25, 1993.

[15]Transcript p. 211, Public Administrative Hearing before the State Engineer, May 25, 1993.

[16]Transcript p. 323-325, Public Administrative Hearing before the State Engineer, May 25, 1993.

whether a water right is subject to forfeiture.[17] The Court stated:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether and when the right vested, and under which law appropriation was initiated. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.[18]

Previously, the State Engineer concluded that the water rights within the Newlands Project, as set forth in the *Alpine Decree*,[19] "were not subject to Nevada's forfeiture statute because they had vested in the United States upon the creation of the Project in 1902, prior to passage of Nevada's forfeiture statute."[20] On appeal, the Ninth Circuit analyzed whether the water rights in the Newlands Project vested in 1902, and concluded that they did not.[21] Rather, the Court held that, as a matter of Nevada law, "the rights could become vested in the individual landowners only upon becoming appurtenant to a particular tract of land."[22] However,

---

[17]*United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993).

[18]*United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1496 (9th Cir. 1993).

[19]Final Decree in *United States v. Alpine Land & Reservoir Co.*, Civil No. D-183 BRT (D. Nev. Oct. 28, 1980).

[20]*United States v. Alpine Land & Reservoir Co.* , 983 F.2d 1487, 1490 (9th Cir. 1993).

[21]Id. at 1495-96.

[22]Id. at 1496.

the Court did not analyze when the water rights in the Newlands Project were initiated.

The State Engineer must now determine if the appropriations of the water rights at issue here were initiated in accordance with the law in effect prior to March 22, 1913. When a right was initiated, that is its priority date, depends upon when the "first step" to appropriate the water was taken and is a matter of Nevada law.

The doctrine of relation back has long applied to water appropriations due to the very nature of a water right and the fact that perfecting the right may take time. The Nevada Supreme Court explained the doctrine of relation back in the following way.

> When any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it.[23]

Accordingly, even though the water was not placed to beneficial use at the time that the first step was taken to secure the water right, so long as the appropriator exercises due diligence, the perfection of the right relates back to the earlier date, the priority date.[24] The state law requirements of "due diligence" and "relation back" apply to reclamation

---

[23]*Ophir Mining Co. v. Carpenter,* 4 Nev. 534, 543-44 (1869).

[24]*United States v. Alpine Land & Reservoir Co.* , 503 F. Supp. 877 (D. Nev. 1980); 2 R. Beck, *Waters and Water Rights* § 14.03(d)(l) at 195-97 (1991); *Black's Law Dictionary* 1158 (5th ed. 1979) (relation back is the "principle that an act done today is considered to have been done at an earlier time").

projects.[25]

In this case, the individual farmers could not begin to irrigate lands within the Truckee Division of the Newlands Project until the United States obtained water rights for the Project on July 2, 1902, and completed construction on the Truckee Canal and Derby Dam in 1905.[26] In its analysis regarding the vesting of water rights, the Ninth Circuit distinguished between the water rights obtained by the United States for the Newlands Reclamation Project in 1902, and the water rights appurtenant to particular tracts of land.[27] While this distinction proved important as to when the water rights vested, this distinction has no importance as to the priority date of water rights in the Truckee Division of the Newlands Project because of the relation back doctrine. The State Engineer finds that the relation back doctrine applies in this situation and the first step taken in the appropriation of the water rights in the Truckee Division of the Newlands Project occurred on July 2, 1902.

Additional evidence further bolsters this finding. Beginning in 1905, any person who wanted to initiate a water right in Nevada was required to obtain a permit from the Nevada State Engineer. Act of March 1, 1905, ch. 46, § 3, 1905 Nev. Stat. 67. The water rights that are the subject of Application 56226 were not initiated by an application to the Nevada State Engineer. Instead, all of the water rights requested to be changed under Application 56226 were initiated in accordance with the Reclamation Act, as evidenced by the documents submitted to the United

---

[25]4 R. Beck, *Waters and Water Rights* § 36.04(b) at 193 n.118 (1991).

[26]*Nevada v. United States* 463 U.S. 110, 116 (1983).

[27]*United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1495 (9th Cir. 1993).

States Department of Interior by the original water right holder.[28] Therefore, the State Engineer finds that the appropriation of the water rights requested to be changed under Application 56226 was initiated in accordance with the law in effect prior to March 22, 1913.

V.

The Applicant assigned reference numbers to each parcel of land comprising the existing place of use of the water rights that are the subject of Application 56226. Each parcel of land is accompanied by a "contract" for a water right from the United States Department of the Interior.[29] The contracts for the water rights appurtenant to parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28 were dated prior to March 22, 1913.[30] The contracts for the water rights appurtenant to parcels 1, 3, 8, 9, 10, 16, 19 and 20 were dated after March 22, 1913. The protestant Tribe claims that the water rights whose contracts were dated after March 22, 1913, are subject to forfeiture.[31] No claim of forfeiture is made for those water rights whose contracts were dated prior to March 22, 1913. While not agreeing with this criterion for determining eligibility for forfeiture, the State Engineer finds that the water rights appurtenant to parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28

---

[28]Exhibit No. 21, Public Administrative Hearing before the State Engineer, May 25, 1993.

[29]Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 25, 1993. The Applicant assigned numbers from 1 through 28, and number 13 was intentionally left blank. Also, the water right appurtenant to parc 1 6 was withdrawn at the hearing.

[30]Exhibit No's. 20-9 and 21, Public Administrative Hearing Dezore the State Engineer, May 25, 1993.

[31]Post Hearing Brief filed by the Pyramid Lake Tribe of Indians, August 16, 1993.

are not subject to forfeiture.

VI.

Of those parcels of land whose water right contracts were dated after March 22, 1913, three parcels have been irrigated at some time during the years 1984 through 1989. Evidence shows that 75% of parcel numbers 8 and 19 and 100% of parcel 20 were irrigated during this period.[32] The State Engineer finds that a continuous five year period of non-use has not occurred for the water rights appurtenant to parcels 8, 19 and 20.

VII.

Of those parcels of land whose water right contracts were dated after March 22, 1913, the protestant Tribe alleges that parcels 1, 3, 9, 10, and 16 have not been irrigated for a significant period of time.[33] Therefore, the Tribe feels that the water rights appurtenant to parcels 1, 3, 9, 10, and 16 should be declared forfeited. As stated earlier, the State Engineer does not believe that these water rights are eligible for forfeiture. Assuming arguendo that forfeiture applies to these water rights, the following sets forth the standard of proof for forfeiture and analyzes the evidence and testimony supporting the allegation of forfeiture for each of these parcels.

The Nevada Supreme Court has held that there must be clear and convincing evidence that the statutory period of non-use has occurred.[34] The Court required this higher standard of proof because the law disfavors

---

[32]Exhibit No. 20-8, Public Administrative Hearing before the State Engineer, May 25, 1993.

[33]Exhibit No's. 20-6 and 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

[34]*Town of Eureka v. Office of the State Enoineer of Nevada,* 108 Nev, 826 P.2d 948 (1992).

forfeitures.

Parcel 1 was described as being "bare land, prepared for cultivation" for the years 1949, 1973, and 1977, based on aerial photographs taken those years.[35] This may be interpreted as cultivated land that happened to be lying fallow with no crop, at those times when the aerial photographs were taken.[36] Parcel 1 was again described as "bare land" in 1984, based on the infrared aerial photographs taken on June 19 and 20, 1984, by the Bureau. The Tribe's witness testified that "the farm unit most likely was in disrepair. It wasn't organized or prepared for cultivation..."[37] However, there is no evidence or testimony showing how that determination was made. The State Engineer has difficulty making a finding of continuous non-use with evidence that the land was prepared for cultivation in 1949, 1973 and 1977. Cultivation is generally associated with irrigation.[34] In addition, there was no evidence of non-use for the years between those years the aerial photographs were taken. The State Engineer finds that the testimony and evidence presented for the years through 1984 do not prove by clear and convincing evidence that a continuous five year period of non-use has occurred.

In support of its allegation of forfeiture, the protestant Tribe refers to a composite map prepared by the Bureau.[32] This map was prepared to show lands with surface water rights as of 1984 that were irrigated one or more years from 1984 through 1989. The interpretation of the composite map concluded that parcel 1 was not irrigated in any of those years.[32] However, there is no evidence or testimony on the record indicating how

---

[35]Exhibit No. 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

[36]Transcript pp. 90-91, Public Administrative Hearing before the State Engineer, May 25, 1993.

[37]Transcript p. 91, Public Administrative Hearing before the State Engineer, May 25, 1993.

the Bureau prepared the composite map or how the map was interpreted. Several questions come to mind related to the determination that parcel 1 was not irrigated: 1. Were aerial photographs taken each of the six years and if so, were they interpreted by a qualified person? 2. Was parcel 1 inspected on the ground each year? 3. Were any of the years classified as dry years, in which the irrigator did not receive his full water entitlement? If so, can a water right be forfeited for non-use i the parcel was not delivered water? 4. What is the resolution of the aerial photographs? Some of the parcels of land in Application 56226 are less than 0.2 acre in area. Lacking answers to these questions, the State Engineer finds that the Tribe failed to provide clear and convincing evidence that parcel 1 was not irrigated for the years 1984 through 1989.

In 1991, parcel 1 was described as "bare land, buildings, and roads."[35] The photograph taken in May, 1993, supports this land description and shows no evidence of irrigation.[38] While there is some question about irrigation of the bare land in 1991 and 1992, there is little doubt that the land on which the buildings stand could not have been irrigated since 1991, when the buildings were first observed. The State Engineer finds that the portion of parcel 1 on which the buildings stand was not irrigated in 1991, 1992, and 1993, which is short of the statutory five years, required for forfeiture.

Parcel 3, in 1949, was described as being "Bare land, prepared for cultivation." In 1973, 1984, and 1991, the land was described as "Farm road."[35] However, in 1977, the land was described as being irrigated.[35] This apparent contradiction can be explained if parcel 3 was not located properly in the interpretation of the aerial photographs taken in 1949, 1973, 1984 and 1991. The Applicant's witness, who is familiar with this area, testified that parcel 3 lies adjacent to the farm road, not on the farm

---

[38]Exhibit No. 20-12, Public Administrative Hearing before the State Engineer, May 25, 1993.

road.[39] He also testified that parcel 3 was irrigated in 1984.[40] The State Engineer finds that the record lacks clear and convincing evidence that a five year period of non-use occurred with respect to parcel 3.

Parcel 9 was described as having buildings on it in 1977, 1984, and 1991.[35] The photograph taken in 1993, shows the buildings and no sign of irrigation.[38] The existence of these buildings on the property precludes irrigation. The State Engineer finds that a period of non-use, greater than five years, has occurred with respect to parcel 9.

The land use history for parcel 10 is similar to that of parcel 1. "Bare land prepared for cultivation" was observed in 1949, 1973, and 1977. "Bare land' was observed in 1984, and a building was observed in 1991.[34] The photograph taken in 1993, shows homes in what appears to be a subdivision.[38] The State Engineer finds, in the same manner as for parcel 1, that the evidence prior to 1991 is not clear and convincing that irrigation did not take place. The State Engineer further finds that parcel 10 has not been irrigated in 1991, 1992, and 1993, which represents a period of non-use that is insufficient to declare a forfeiture.

In the years 1973, 1977, 1984 and 1991, a building was observed on parcel 16.[34] The 1993 photograph shows a fairly new building that could not have been constructed as long as twenty years ago.[38] There is no evidence or testimony on the record, whether the building observed in 1973, 1977, 1984 and 1991, is the same as that in the 1993 photograph. The Applicant's witness testified that, as ditch water master for TCID, he Personally turned irrigation water onto parcel 16, during the period 1984

---

[39]Transcript pp. 249-252, Public Administrative Hearing before the State Engineer, May 25, 1993.

[40]Transcript p. 244, Public Administrative Hearing before the State Engineer, May 25, 1993.

through 1989 (later clarified as 1984 through 1986).[41] The State Engineer finds that the record lacks clear and convincing evidence that a five year period of non-use occurred with respect to parcel 16.

VIII.

The protestant Tribe asserts that those water rights in Application 56226, whose contracts were dated prior to March 22, 1913, have been abandoned.[5] The Nevada Supreme Court held that abandonment is the voluntary relinquishment of a water right by the owner, with the intention of forsaking and deserting it.[42] The Tribe presented evidence[43] and testimony[44] that some of the lands to which these water rights are appurtenant, have not been irrigated for a significant period of time. The Tribe feels that a prolonged and unexplained non-use creates a rebuttable presumption of an intent to abandon.[45] However, the Ninth Circuit Court of Appeals found that although the longer the period of non-use, the greater the likelihood of abandonment, there was no support for a rebuttable presumption under Nevada law.[46]

Permanent improvements, such as farm buildings, roads and

---

[41]Transcript pp 239-243, 245, Public Administrative Hearing before the State Engineer, May 25, 1993.

[42]*In re Waters of Manse Soring and its Tributaries,* 60 Nev. 280, 285-290, 108 P.2d 311 (1940).

[43]Exhibit No. 20, Public Administrative Hearing before the State Engineer, May 25, 1993.

[44]Transcript pp. 89-100, Public Administrative Hearing before the State Engineer, May 25, 1993.

[45]Post-hearing brief filed by the Pyramid Lake Paiute Tribe of Indians, August 16, 1993.

[46]*United States v. Alpine Land and Reservoir Co.,* 983 F.2d 1487, 1494 (9th Cir. 1993).

canals, have been constructed on some of the parcels.[47] The Tribe feels that prolonged non-use coupled with the existence of permanent improvements establishes abandonment of the water rights. However, the Tribe presented no evidence or testimony related to the intent to abandon these water rights.

Since the Town of Fernley has owned the water rights at issue here, it has kept the rights in good standing, evidenced by paying the TCID assessments [13,14] and filing appropriate ownership documentation with TCID.[15] The TCID Project Manager testified that the assessments are current.[48] There is no evidence on the record indicating that any previous owner failed to pay the assessments or in any way displayed an ibtent to abandon or forsake these water rights. The State Engineer finds that there is insufficient evidence and testimony on the record to indicate an intent to abandon these water rights.

IX.

The protestant Tribe alleges that the water right appurtenant to parcel 16 has never been perfected and therefore, under Nevada law cannot be changed.[5,49] The Tribe relied upon aerial photographs taken in 1949, 1973, 1977, 1984, 1990 and 1991, to make this allegation. Mr. Edwin Brush, who was the ditch water master for TCID from 1955 to 1987, testified that he personally turned water from the ditch onto parcel 16.[50]

---

[47]Exhibits 20-5 and 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

[48]Transcript p. 326, Public Administrative Hearing before the State Engineer, May 25, 1993.

[49]Exhibit No. 20-6, Public Administrative Hearing before the State Engineer, May 25, 1993.

[50]50 Transcript pp. 239-243, Public Administrative Hearing before the State Engineer, May 25, 1993.

The State Engineer finds that parcel 16 was irrigated and the water right appurtenant to parcel 16 was perfected by putting the water to beneficial use.

X.

The protestant Tribe contends that granting Application 56226 would impair the value of its Truckee River water rights because the Tribe is entitled to all of the unappropriated Truckee River water.[5] The question of the availability of unappropriated water is not at issue. Application 56226 seeks only to change water already appropriated under the *Orr Ditch Decree.* The State Engineer finds that approval of Application 56226 would not cause the Newlands Project to exceed the quantity of water provided for in the *Orr Ditch Decree.* The State Engineer further finds that there would be no impairment of any existing rights on the Truckee River as a result of the approval of Application 56226.

XI.

The protestant Tribe feels that approval of Application 56226 would be detrimental to the public welfare in that it would jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout and adversely affect the recreational value of Pyramid Lake.[5] The State Engineer recognizes and is sympathetic to public interest values closely tied to continued survival of the species in the lower reaches of the Truckee River and Pyramid Lake. However, Application 56226 seeks only to change the manner of use and place of use of water already appropriated under the *Orr Ditch Decree.* Therefore, the State Engineer finds that the Newlands water rights set forth under the *Orr Ditch Decree* would not be exceeded if Application 56226 were approved.

The Ninth Circuit Court of Appeals addressed the Tribe's public

interest argument.[51] The Court stated:

> The Tribe's public interest argument cannot be regarded as anything short of an attempted collateral attack on the *Orr Ditch* decree. "[E]veryone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." *Nevada v. United States,* 463 U.S. at 143, 103 S.Ct. at 2924. The Engineer found that the proposed transfers would not cause the Project to exceed the overall maximum water consumption provided for in the *Orr Ditch* and *Alpine* decrees, and the record supports this finding. Indeed, the Engineer found that these proposed transfers "cumulatively represent a reduction in diversion from the existing places of use which results in less demand on project water."
>
> By establishing the maximum aggregate amount of water to which the Project was entitled, the *Orr Ditch* decree necessarily embodies an evaluation of the competing public interests in supplying Project farmers with sufficient water to grow their crops, and Pyramid Lake with sufficient water to benefit indigeneous[sic] fishes. Because the Tribe has asserted no threat to the public interest apart from those considered in the *Orr Ditch* decree's water rights allocation, the Engineer's conclusion that the transfers do not conflict with the Tribe's water rights satisfies both the public interest aspect and the conflicting rights aspect of section 533.370(3). Moreover, the Engineer's conclusion that the proposed transfers did not threaten to harm the lake's fishes is supported by substantial evidence.

---

[51]United States v. Aloine Land & Reservoir Co., 878 F.2d 1217, 1224 (9th Cir. 1989).

The State Engineer finds that Application 56226 is not unlike those applications considered by the Ninth Circuit Court of Appeals except that, Application 56226 seeks also to change the manner of use to municipal. Therefore, the State Engineer finds that the approval of Application 56226 does not threaten to prove detrimental to the public interest.

XII.

The protestant Tribe feels that these applications cannot be approved because they involve the change "from lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands."[5] However, the Tribe does not present any legal basis for this assertion. Nevada water aw allows the eligibility for changing the place of use based on the impracticability to irrigate the existing place of use, however, it does not limit changes only to those that meet the eligibility.[52] In addition, the Ninth Circuit Court of Appeals affirmed the fact that the State Engineer is not precluded by statute from granting a change application where it is not impracticable to use the water at the present site.[53] Therefore, the State Engineer finds that Application 56226 cannot be denied on the basis of the Practicability to irrigate the existing place of use.

XIII.

The protestant Bureau feels that the approval of Application 56226 could result in a lower quantity of water flowing to the groundwater basin in the Fernley area.[4] Under present irrigation practices in the Fernley area, the Bureau's witness estimated that each acre of irrigated land returns approximately 1.5 acre feet of the applied 4.5 acre feet, directly to the

---

[52]NRS 533.040.

[53]*United States v. Alpine Land & Reservoir Co.,* 878 F.2d at 1217, 1227. (9thCir. 1989).

groundwater aquifer.[54] According to the Bureau's witness, none of this water would recharge the groundwater aquifer if irrigation ceases and the water is used for municipal purposes.[54] The State Engineer finds that the Bureau did not consider the fact that approximately half of the water diverted for municipal use in the Fernley area, flows to the wastewater treatment facility, whose effluent is discharged directly to the groundwater basin via rapid infiltration basins.[55] The State Engineer further finds that the Bureau failed to consider tnat at a conveyance efficiency of 60%, an additional 3 AF/AC is lost to the groundwater aquifer from transmission losses. The State Engineer finds that the flow of water to the groundwater resource in the Fernley area would not be significantly diminished as a result of changing the manner of use from irrigation to municipal.

XIV.

The protestant Bureau contends that approval of Application 56226 would result in a reduction of the conveyance efficiency of delivery of water within the Newlands Project.[4] The Bureau did not have any quantitative evidence to support this contention but was very concerned about the proposed year-round diversions, especially during the non-irrigation season.[56] However, the Bureau has failed to consider that the Truckee Canal has been used for over 90 years for year round delivery of water to Lahontan Dam on the Carson River. A check of the stream flow records collected by the United States Geological Survey reflects

---

[54]Transcript pp. 159-160, Public Administrative Hearing before the State Engineer, May 25, 1993.

[55]Transcript pp. 273-276, Public Administrative Hearing before the State Engineer, May 25, 1993.

[56]Transcript pp. 189-190, Public Administrative Hearing before the State Engineer, May 25, 1993.

that the Truckee Canal rarely transports less than 25 cfs.[57] The State Engineer finds that the diversion of water for municipal use as proposed under Application 56226 would not lessen the efficiency of the Truckee-Carson Irrigation District in the delivery of water.

XV.

The Town of Fernley by agreement with TCID, has paid assessments to TCID for all the Newlands Project water rights it acquired, including those rights requested to be changed under Application 56226.[13, 14] The State Engineer finds that approval of Application 56226 will not adversely affect the cost of water for other water users within the district.

XVI.

In many stream systems, a portion of the water diverted for irrigation. finds its way back to the stream as return flow. The return flow is then available for diversion by downstream users. When the manner of use is changed from irrigation to municipal, often there is no return flow back to the stream. To account for this lack of return flow, the *Alpine Decree*[19] allows only the consumptive use portion or 2.99 acre feet per acre to be changed to municipal use.

The *Orr Ditch Decree*[2] contains no such limitation on the quantity of water allowed in a change of manner of use. However, in many cases, the return flow, in a change to municipal use in the Truckee Meadows, is available to downstream users because the treated wastewater effluent is discharged back into the Truckee River system. The State Engineer has approved changes to municipal use, allowing the entire duty to be changed, because there is no reduction in the quantity of water available to downstream users.

In determining whether the consumptive use portion or the entire duty of 4.5 acre feet per acre may be changed under Application 56226,

---

[57]See U.S.G.S. gage, Truckee Canal at Wadsworth Station No. 10351300.

the State Engineer must evaluate the impact on the downstream flow of water. The first step is to examine the fate of the return flow off of irrigated land described in Application 56226 as the existing place of use. This land was irrigated with water diverted through the Truckee Canal. The return flow from this land did not flow back into the system and was never available to downstream users.[58] Under Application 55226, where the Town of Fernley would divert water for municipal use, the return flow would also not return to the Truckee Canal, but instead, would be discharged to the groundwater via the rapid infiltration basins.[55] The State Engineer finds that the change to municipal use of the entire duty of 4.5 acre feet per acre, presents no adverse impacts on the downstream users.

XVII.

The protestants Bureau and Tribe believe that Application 56226 should be denied because the Town of Fernley has not complied with Public Law 101-618, in that the Town has not requested approval from the Secretary of the Department of the Interior.[4,5] The State Engineer recognizes the Secretary's authority and responsibility under Public Law 101-618, however, the State Engineer has no authority to enforce the provisions of Public Law 101-618. The State Engineer finds that his approval of Application 55226 in no way releases the Town of Fernley from its responsibility to comply with all applicable federal, state, and local requirements.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter.[59]

II.

---

[58]Transcript p. 315, Public Administrative Hearing before the State Engineer, May 25, 1993.

[59]NRS 533.325 and *Orr Ditch Decree,* p. 88.

The State Engineer is prohibited by law from granting a permit under an application to change where:[60]

A. The proposed change, if within an irrigation district, adversely affects the cost of water for other holders of water rights in the district;

B. The proposed change lessens the district's efficiency in its delivery or use of water;

C. The proposed change conflicts with existing rights; or

D. The proposed change threatens to prove detrimental to the public interest.

III.

The *Orr Ditch Decree* sets forth the procedure and authority for applications to change the point of diversion, place and manner of use of decreed waters of the Truckee River.

IV.

The owner of the water rights requested to be changed under Application 56226 is the Town of Fernley.

V.

None of the parties to this action made any claim that the water rights whose contracts were dated before March 22, 1913, are subject to forfeiture. The parcels affected are 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28. While not agreeing with this rationale for the reasons more fully set forth below, the State Engineer concludes that the water rights appurtenant to these parcels are not subject to forfeiture.

VI.

The contracts for the water rights appurtenant to parcels 8, 16, 19 and 20, were dated after March 22, 1913. Based on the evidence and

---

[60]NRS 533.370.

testimony on the record, the State Engineer concludes that these parcels were irrigated during the alleged period of non-use. Therefore, even if the forfeiture statute were found to apply, the water rights appurtenant to these parcels can not be declared forfeited.

VII.

The evidence and testimony supporting the allegation of forfeiture of water rights appurtenant to parcel numbers 1 , 3 and 10 do not meet the 'clear and convincing" standard. Therefore, the State Engineer concludes that even if the forfeiture statute were found to apply, the water rights appurtenant to these parcels can not be declared forfeited.

VIII.

There is clear and convincing evidence on the record indicating that parcel 9 has not been irrigated for a period of time greater than five years. If the forfeiture statute were found to apply to the water right appurtenant to parcel 9, then this water right should be declared forfeited. However, for reasons stated below, the State Engineer concludes that the forfeiture statute does not apply to these water rights.

IX.

The State Engineer concludes that none of the water rights at issue here are subject to forfeiture under NRS 533.060. This includes the water rights whose contracts were dated after March 22, 1913. The water rights requested to be changed by Application 56226 were not initiated by permits issued by the State Engineer, which was required under the Nevada Water Law, in effect after March 22, 1913. Instead, the State Engineer concludes that these water rights were initiated under the Reclamation Act of 1902.

X.

The record in this Proceeding contains no evidence that there was ever an intent to abandon any of the water rights requested to Ruling be changed under Application 56226. Evidence shows that the operation and

maintenance changes have always been paid and are current

XI.

The State Engineer concludes that the water right appurtenant to parcel 16 was perfected.

XII.

There is no evidence on the record that approval of Application 56226 will impair the value of any other existing rights or threaten to prove detrimental to the public interest.

XIII.

The State Engineer concludes that approval of Application 56226 will not result in a lower quantity of water flowing to the groundwater in the Fernley Area.

XIV.

Since water has historically been transported through the Truckee Canal on a nearly continuous basis for over 90 years, the State Engineer concludes that said diversions by the Town of Fernley would not lessen the efficiency in the delivery of water to other users within TCID.

XV.

The State Engineer concludes that as long as the Town of Fernley pays the appropriate charges, the approval of Application 56226 will not adversely affect the cost of the water for other water users within TCID.

XVI.

The entire duty of 4.5 acre feet per acre may be changed to municipal use under Application 56226 with no impacts on any exstng rights.

XVII.

The State Engineer does not have the authority to enforce the requirements of federal law, including Public Law 101-618.

RULING

The protests to the granting of Application 56226 are herewith

overruled and Application 56226 is approved in the amount of 280.78 acre feet, subject to existing rights and the payment of statutory fees.

Respectfully submitted,

s/_____

R. Michael Turnipseed, P.E.

State Engineer

RMT/JCP/pm

Dated this 27th day of May, 1994

NOT FOR PUBLICATION

FILED NOV-8 2001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner-Appellant,

v.

ORR WATER DITCH COMPANY, et al.,

Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,

Defendants-Appellees.

No. 99-16817

D.C. No. CV-N-A-3-LDG

Town of Fernley; Appeal of State Engineer Ruling No. 4116

UNITED STATES OF AMERICA,

Plaintiff-Appellant

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

v.

ORR WATER DITCH COMPANY, et al.,

Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT;

THE STATE ENGINEER,

Defendants-Appellees.

No. 99-16817

D.C. No. CV-N-A-3-LDG

Town of Fernley; Appeal of State Engineer Ruling No. 4116

ORDER

Before: SCHROEDER, Chief Judge, NOONAN and W. FLETCHER, Circuit Judges.

Chief Judge Schroeder and Judge W. Fletcher have voted to deny the three petitions for rehearing and petitions for rehearing en banc filed by Appellees Truckee Carson Irrigation District, State Engineer, and Town of Fernley, respectively, on August 20, August 20, and August 22, 2001. Judge Noonan voted to grant the same petitions for rehearing and recommended granting the same petitions for rehearing en banc.

The full court has been advised of the petitions for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing and the petitions for rehearing en banc are DENIED.

§ 383. - Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, ch 1093, § 8 in part, 32 Stat. 390.)

NRS 533.060 Right to use limited to amount necessary; abandonment of rights; no acquisition of prescriptive right; reservation of rights by state.

1. Rights to the use of water must be limited and restricted to so much thereof as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch. All the balance of the water not so appropriated shall be allowed to flow in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby.

2. Except as otherwise provided in subsection 4, if the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir or other means of diversion had never been constructed, and any qualified person may appropriate any such water for beneficial use.

3. No prescriptive right to the use of such water or any of the public water appropriated or unappropriated can be acquired by adverse user or adverse possession for any period of time whatsoever, but any such right to appropriate any of such water shall be initiated by first making application to the state engineer for a permit to appropriate the same as provided in this chapter and not otherwise.

4. The State of Nevada reserves for its own present and future use all rights to the use and diversion of water acquired pursuant to chapter

462, Statutes of Nevada 1963, or otherwise existing within the watersheds of Marlette Lake, Franktown Creek and Hobart Creek and not lawfully appropriated on April 26, 1963, by any person other than the Marlette Lake Company. No such right may be appropriated by any person without the express consent of the legislature.

[8:140:1913; A 1917, 353; 1949, 102; 1943 NCL § 7897]—(NRS A 1979, 1161)

NRS 533.085 Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

2. Any and all appropriations based upon applications and permits on file in the state engineer's office on March 22, 1913, shall be perfected in accordance with the laws in force at the time of their filing.

[84:140-1913; 1919 RL p. 3247; NCL § 7970]

§ 533.324. "Water already appropriated" defined

As used in NRS 533.325, 533.345 and 533.425, "water already appropriated" includes water for whose appropriation the state engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made.

HISTORY: 1993, CH. 181, § 1 , p. 321.

NOTES:

EDITOR'S NOTE – Acts 1993, ch. 181, § 2, provides: "1. The legislature declares that it has examined the past and present practice of the state engineer with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water described in section 1 of this act [NRS 533.324] and finds that those applications have been approved or denied in the same manner as applications involving water applied to the intended use before the application for change is made.

"2. The legislature intends by this act to clarify rather than change the operation of NRS 533.325, 533.345 and 533.425 with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water described in section 1 of this act [NRS 533.324], and thereby to promote stability and consistency in the administration of chapters 533 and 534 of NRS.

"3. The legislature hereby ratifies each approval granted by the state engineer pursuant to NRS 533.325, 533.345 or 533.425 before the effective date of this act [May 27, 1993] for a change of the place of diversion, manner of use or place of use of water already appropriated if the change is consistent with the interpretation of that term now codified in

section 1 of this act [NRS 533.324]."

Acts 1993, ch. 191, § 3, provides: "This act becomes effective upon passage and approval [May 27, 1993], and, to the extent that it ratifies previous decisions of the state engineer in the manner described in section 2 of this act, applies retrospectively as well as prospectively."

EFFECTIVE DATE – This section became effective May 27, 1993.

NRS 533.325 Application to state engineer for permit.

Any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the state engineer for a permit to do so.

[Part 59:140:1913; A 1919, 71; 1951, 132]—(NRS A 1991, 859)

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA
IN EQUITY, DOCKET NO. A3

The United States of America, plaintiff

vs.

1. Daisy Adams, successor to George Imes and Andrew Drake, et al.

Solicitors for the United States: Ethelbert Ward, John F. Truesdell and Oliver P. Morton, special assistants to the Attorney General, William Woodburn, as former United States Attorney for the District of Nevada; George Springmeyer. United States Attorney for the District of Nevada, and R.O. Withers. Solicitors for numerous defendants are as hereinafter designated.

It is hereby ordered that all persons herein named as owners, grantors and successors be made and considered parties to this action and that all parties herein named as grantees or successors be substituted for their respective predecessors, with all the rights of their grantors and respective predecessors.

ERRATA SUPPLEMENT

Page 8, first column, line 45, "the name of which was changed to, and at the date o this Decree is Sierra Pacific Power Company," should be substituted for "succeeded by Truckee River

Power Company, incorporated."

Page 8, second column, 4th line from the end of subdivision (W), the name "Walliam" should be "William."

In all tabulations where the same appears, the "Solicitor" column should be eliminated.

Page 14, claim 50a, the name "Cardella" should be "Gardella."

Page 17, claim 78, the name "Degioranni" in both instances should be "Degiovanni."

Page 29, claim 209, the following descriptions of lands should be inserted in appropriate columns as indicated:

1/4	In of	1/4	Sec.	T-N	R-E
NW		NW	31	19	20
SE		NW	31	19	20
NE		NW	31	19	20
NW		NE	31	19	20
SW		NE	31	19	20
SE		NE	31	19	20
NE		NE	31	19	20
SW		NW	31	19	20
NW		NW	32	19	20
SW		SW	29	19	20

Page 34, claim 272, the name "Reno Pressed Brick Company" should be "Reno Press Brick Company."

Page 37, claim 335, "283" in "Acre Feet" column should be "382."

Page 39, claim 350a, "388" in "Acre Feet" column should be "361."

FINAL DECREE

This cause having been heretofore heard by the Court and, following argument by counsel, the matter having been referred to George F. Talbot, as Special Master, and the said Special Master having thereafter rendered his report and made his findings, and the same having been approved and adopted by the Court (except as disallowed or modified by the Court) by a certain order termed "Temporary Restraining Order" made and entered in said cause under date of February 13, 1926:

NOW, THEREFORE, in accordance therewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That the parties, persons, corporations, intervenors, grantees, successors in interests and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every other one, hereby adjudged to be the owners of the water rights hereinafter specified and set forth and entitled and allowed to divert and use, from the Truckee River and its tributaries and from the streams, springs, drain and waste waters hereinafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs, for the irrigation of their respective hereinafter described lands, for generating electricity and power, for municipal purposes, for supplyign the people living in cities and towns, for reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in

the respective amounts and subject and according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed.

TRUCKEE RIVER DIVERSIONS

Government Rights

INDIAN DITCH

Claim No. 1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848 and which wa the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

For the irrigation of 3130 acres of Pyramid Lake Indian Reservation bottom lands, plaintiff, the United States of America, is entitled and allowed to divert from the Truckee River through the Indian Ditch, the intake of which is to be on the left bank of the river in Section 18, T. 22 N., R. 24 E., Mount Diablo Base and Meridian, not exceeding 58.7 cubic feet of water per second to an amount not exceeding 14,742 acre feet of water in any calendar year with a priority of December 8, 1859; provided the amount of water so to be diverted shall not exceed a flow of one miner's inch, or one-fortieth of one cubit foot per second per acre for the aggregate number of acres of this land being irrigated during any calendar year and the

amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85-100 of any inch or 85-100 of one-fortieth of one cubic foot per second per acre for the total number of acres irrigated, and provided that the amount of water so diverted during any such year shall not exceed 4.71 acre feet per acre for the aggregate number of acres of this land being irrigated during that year, and further provided that the amount of water applied to the land shall not exceed four acre feet per acre for the aggregate number of acres of this land being irrigated during any calendar year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

Claim No. 2. In addition to water for the above mentioned 3130 acres of Pyramid Lake Indian Reservation bottom lands, the Government is hereby and will be allowed to divert water from the Truckee River, with a priority of December 8, 1859, to the amount of one-fortieth of one cubic foot per second per acre for the irrigation of 2745 acres of Pyramid Lake Indian Reservation bench lands. The water so allowed for bench lands may be diverted from the Truckee River through the Truckee Canal or any other ditch now or hereafter constructed as the plaintiff may desire or authorize; provided that the amount of water for bench lands shall not exceed during any calendar year 5.59 acre feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre feet per acre applied to the lands, for the aggregate number of acres of this land being irrigated during any year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

DERBY DAM AND TRUCKEE CANAL

Claim No. 3. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River in the SW1/4 of Section 19, in T.20, N., R. 23, E., Mount Diablo Base and Meridian, and with the construction of the Truckee Canal, with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres. On April 30, 1919, the Government had expended for this project $6,252,000.00. The lands so withdrawn for reclamation are naturally dry and arid and without the application of water are of little or no value, but with irrigation will produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

LAKE TAHOE STORAGE

Claim No. 4. Under the Reclamation Act and for irrigation and other beneficial uses on lands under said project and on lands within the basins of the Truckee, Carson and Humboldt rivers in Washoe, Storey, Lyon, Churchill and Humboldt counties, in the State of Nevada, and pursuant to notice posted, by direction and authority of the Secretary of the Interior and for and on behalf of the United States, on the right bank of the Truckee River at the site of the dam in said river near Tahoe City and in Placer County, California, and about 500 feet downstream from Lake Tahoe, on the 21st day of May, 1903, plaintiff is entitled to, and is allowed with a priority of that date and during all seasons of the year, to have flow into and to hold and store in lake Tahoe and in a reservoir made of said lake by a dam at said site in said river constructed with the spillway crest thereof six feet above the floors of the flow-ways of said dam as then

existing, all waters of or coming into said river or said lake, both surface and under flow, to the extent of 3,000 cubic feet per second and to the extent of the capacity of said lake as a reservoir made by said dam, to said height and subject to the continuous out-flow through said river from said lake or reservoir so made by said lake or dam, of such an amount of water as plaintiff may desire to release or may discharge from said lake or reservoir not exceeding at any time a flow of 3,000 cubic feet of water per second.

In addition to the above specified rights, the United States is entitled to store, discharge and control water in Lake Tahoe as provided in the judgment and decree filed and entered on June 4, 1915, in the case of the United States, plaintiff, versus The Truckee River General Electric Company, a corporation defendant, in the District Court of the United States in and for the Northern District of California, Second Division, and subject to said decree the United States shall be entitled to discharge from Lake Tahoe an amount of water sufficient to deliver to the head of the Truckee Canal at the Derby Dam, after transportation loss, 1,500 cubic feet per second. The plaintiff is entitled and allwoed at will to release and discharge any fo the water stored, or by this decree allowed to be stored, in Lake Tahoe and to flow the same and any other water to which it is entitled, acording [sic] to its priority, through the Truckee River to the Derby Dam and there divert the same, through the Truckee Canal for irrigation, for storage in the Lahontan Reservoir, for generating power and for other purposes. The rights of said defendant Sierra Pacific Power Company (formerly The Truckee River General Electric Company) under said judgment and decree are hereby recognized and confirmed.

Power Ditches

FARAD PLANT

Claim No. 5. The Sierra Pacific Power Company, a corporation owner, is entitled an dallowed to divert at all times from the Truckee River through the Farad Power Flume, which has its intake on the north bank of the Truckee River in the S ½ of Lot 6 in the NW 1/4 of Section 30, Township 18 North, Range Eighteen East, sufficient water, with a priority of the year 1899, to deliver, after transportation loss, to the wheel of the Farad Hydro-Electric power plant, 325 cubic feet of water per second and sufficient additional water with a priority of 1906 to deliver, after transportation loss, to the wheel of the Farad Hydro-Electric power plant, 325 cubic feet of water per second and sufficient additional water with a priority of 1906 to deliver, after transporation loss, to the wheel of said plant, 75 cubic feet of water per second, said plant being situate in the SE 1/4 of Section 12, Township 18 N.R. 17 E., for the generation of electric power in said plant.

FLEISH PLANT

Claim No. 6. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Fleish Power Ditch and Flume, which has its intake on the east bank of the Truckee River in the SE 1/4 of Section 6, Township 18, N.R. 18 E., sufficient water with a priority of February 16, 1904, to deliver, after transportation loss, to the wheel of the Fleish Hydro-Electric power plant, 327 cubic feet of water per second, said plant being situate in the NE 1/4 of the SE 1/4 of Section 30, Township 19 N.R. 18 E., for the generation of electric power in said plant.

VERDI PLANT

Claim No. 7. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Verdi Power Ditch and Flume, which has its intake on the east bank of the Truckee River in the SE 1/4 of the SE 1/4 of Section 19, T. 19 N.R. 18 E. sufficient water, with a priority of October 21, 1909, to deliver, after transportation loss, to the wheel of the Verdi Power Plant 399 cubic feet of water per second, said plant being sitate in the SE 1/4 of Section 89, T.19 N.R. 18 E. for the generation of electric power in said plant.

In addition to such diversion for power purposes, Sierra Pacific Power Company, a corporation, is allowed to divert from said river through the Verdi Power Ditch 220 inches or 5.50 cubic feet of water per second for supplying the Katz Ditch for irrigation to the extent and with the priority hereinafter allowed to this company, for the Katz Ditch under irrigation rights.

In addition to such diversions for power purposes and for so supplying the Katz Ditch with water for irrigation, Sierra Pacific Power Company, a corporation, is entitled and allowed to divert and transport from the Truckee River, through the Verdi Power Ditch and Flume and to deliver to Verdi Lumber Company, a corporation, said Verdi Lumber Company is entitled to have diverted from said river through said ditch and flume by, and to receive from the Sierra Pacific Power Company, 100 inches of water with a priority of the year 1894 for supplying and maintaining the log pond of the Verdi Lumber Company in the Town of Verdi, and for logging and saw mill purposes.

WASHOE PLANT

Claim No. 8. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from

the Truckee River through the Washoe Power Ditch and Flume, which has its intake on the south bank of the Truckee River, in the NW 1/4 of the NE 1/4 of Section 16, T. 19 N.R. 18 E. sufficient water, with a priority of October 27, 1902, to deliver, after transportation loss, to the wheel of the Washoe Hydro-Electric Power Plant 396 cubic feet of water per second, said plant being situate in the SW 1/4 of the SW 1/4 of Section 14, in said township and range, for the generation of electric power in said plant.

Of the water so allowed to be diverted through the Washoe Power Ditch and Flume, Sierra Pacific Power Company is allowed to use during the irrigation season 12.4 inches or .31 cubic feet of water per second, not exceeding a seasonable amount of 50 acre feet for the irrigatin of 12.4 acres of its land as hereinafter described and provided under Washoe Power Ditch under irrigation rights.

Also of the amount of water allowed to be diverted through the Washoe Power Ditch, Sierra Pacific Power Company is entitled and allowed to deliver to the defendant Leonidas Frederick Johnson and he is entitled and allowed to have and receive from Sierra Pacific Power Company, 50 inches or 1.25 cubic feet of water per second, to the seasonal amount of 257 acre feet, for the irrigation of his lands as described and as provided hereinafter under Washoe Power Ditch under irrigation rights.

RENO PLANT

Claim No. 9. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Reno Power Ditch and Flume, which has its intake on the south bank of the Truckee River 1365 feet north, 35 degrees west from Quarter Section corner between Section 15 and 16, T. 19 N.R. 19 E. sufficient water with a priority of November 1,

1909 to deliver after transportation loss, to the wheel of said plant 46 cubic feet of water per second, said plant being situate in NE 1/4 of NE 1/4 Section 15, in said township and range, for the generation of electric power in said plant.

In addition to such allowed diversions for power purposes through the Reno Power Ditch and Flume, Sierra Pacific Power Company is entitled and allowed to divert from the Truckee River and convey through said ditch and flume and deliver to defendants Sarah McClure, James Murray, William Murray and Sam Murray and their successors, and they are entitled and allowed to have and receive from said company, 50 inches of water for the irrigation of their lands as hereinafter described and provided under Indian Flat Ditch under irrigation rights.

RIVERSIDE MILL DITCH

Claim No. 10. The Riverside Mill Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Riverside Mill Ditch and Flume, which has its intake on the north bank of the Truckee River at a point 84 feet westerly from the center of Chestnut Street in the City of Reno and in the NW 1/4 of the SE 1/4 of Section 11, T. 19, N., R. 19, E., 70 cubic feet of water per second with a priority of May, 1863, for operating the Riverside Flour Mill in the City of Reno and for generating power and for milling purposes.

WADSWORTH POWER PLANT

(Solicitor: James T. Boyd)

Claim No. 13. The Wadsworth Light and Power Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Wadsworth Light and Power

Company Ditch, which has its intake on the north bank of the Truckee River in the NW 1/4 of the SW 1/4 of Section 13, T. 20, N., R. 23, E., Mount Diablo Base and Meridian, 31.3 cubic feet of water per second with a priority of June 26, 1897, for delivering, after an allowed transportation loss of 20 per cent, 25 cubic feet of water per second to the wheel at the pumping and power plant of this company, situated in the SE 1/4 of the SE 1/4 of Section 33, in T.21, N., R. 24, E., M.D.M., for the operation thereof and for pumping and for generating electrical and other power.

WADSWORTH WATER SUPPLY

(Solicitor: James T. Boyd)

Claim No. 14. In addition to the amount of water so allowed to be diverted for generating power, for pumping and the operation of its plant, the Wadsworth Light and Power Company is entitled and allowed to divert at all times from the Truckee River through its said power ditch, for supplying the Town of Wadsworth and the people living in or near this town with water for fire protection, for the irrigation of their lawns, gardens and lands, and for household and other purposes, 3.13 cubic feet of water per second with a priority of June 26, 1897, for the delivery, after an allowed transportation loss of 20 per cent, of 2.5 cubic feet of water per second to the reservoir of said company in the SE 1/4 of the SE 1/4 of Section 33, in T.21, N., R. 24, E., M.D.M., and to said people for said purposes. (See Irrigation Rights for irrigation water allowed under this ditch, No. 635.)

WINTER DITCH REGULATION

The owners and operators of ditches through which the

diversion of water is allowed for generating electricity and power and for milling, mechanical and municipal purposes, and for supplying the inhabitants of any city or town, whenever ice shall collect in any of their ditches, shall be allowed to divert from the Truckee River and use such additional amount of water as may be required for flushing out said ice and so long only as may be required for such flushing, provided that the water diverted for such flushing shall not in any case be more than 20 per cent of the amount which is fixed and allowed by this decree to be diverted through the ditch in which said flushing is done.

All water diverted or used for generating electricity or power or for operating mills or power plants shall be returned directly to the Truckee River after being so used. Extra water for preventing congestion by ice and for flushing ice allowed to be used in ditches supplying water for municipal purposes when required must be returned directly to the river when used for these purposes.

IRRIGATION RIGHTS

The parties, persons and corporations hereinafter named and their grnator and predecessors in interest have acquired rights of appropriation in, and have diverted and appropriated from the Truckee River and its tributaries and used for the necessary irrigation of their respective hereinafter described lands, water in the respective amounts and under the respective priorities as stated in the following table. As shown by the following tabulations and columns, each of the parties, persons and corporations named in the columns headed "Owner," directly or by his, her or its grantor or predecessor in interest, on and continuing after the date in the columns headed "Date of Priority" and opposite his, her or its name or in connection therewith, and through the ditch or ditches named in the column

headed "Ditch" and opposite his, her or its name or described lands, for the necessary irrigation of his, her or its lands as described opposite his, her or its name and in the columns under the words "Acres Irrigated" and following columns, diverted and appropriated water in the amount or amounts stated opposite his, her or its name or described lands and in the columns, headed "Approximate Diversion," and water sufficient to deliver to his, her or its said lands after transportation loss, the amounts in flow and acre feet per season stated opposite his, her or its name or described lands and in the columns under the words "Amount Allowed Delivered to Land.":

[TABLE OMITTED]

GENERAL PROVISIONS

In the foregoing table and columns pertaining to irrigation water rights the word, "Direct," means that the acreages thereunder are irrigated by drain or waste water hereby allowed and ordered for the irrigation thereof; the word, "Season," means the time in any calendar year when irrigation may be needed; the word, "Priority," means the time when the water right was initiated. "Inch" means one-fortieth (1/40th) of one cubic foot per second, which, in general is the amount of water which will flow through an orifice having an area of one square inch, under a pressure of six (6) inches at the center of one square inch, under a pressure of six (6) inches at the center of the opening. "Acre Foot," means the amount of water which will cover an area of one acre to a depth of one foot.

All of the above described ditches, lands and sections are in townships north and ranges east, Mount Diablo Base and Meridian.

All of the irrigated lands are in the Astate of Nevada, except a part of the tracts listed under Dog, O'Neill, and Sunrise creeks. All of the ditches, canals and flumes are in the State of Nevada excepting the Farad and the upper end of the Fleish. Lake Tahoe is partly in Nevada and partly in California and the outlet of the lake to the Truckee River and the dam controlling the storage in the lake are in the State of California.

Without the application of water thereto the above described lands are dry and arid and irrigation is necessary for the production of valuable crops thereon. The respective amounts of water hereinbefore stated to have been appropriated for or used on these lands, are in each instance as specified therefor necessary and sufficient for the reasonable and economical irrigation of crops thereon other than grain, potatoes, corn and beets. These do not need to be irrigated for so many months as alfalfa and pasture. Only two-thirds of the amount of water in acre feet hereinbefore specified or allowed for the irrigation of any of the above described tracts of land is necessary for, or should be or is allowed for the irrigation of grain grown thereon. Only four-fifths of the amount of water in acre feet designated above for the irrigation of said tracts of land is necessary for, or should be or is allowed for, the irrigation of potatoes, corn or beets grown thereon. An additional amount of ten per cent of the quantity of water hereinbefore specified in acre feet for the irrigation of any of the above described lands is necessary for and should be and is allowed for the irrigation thereof during the first year that alfalfa is sown thereon, whether the alfalfa be sown with or without grain.

The amounts of water which the parties to this action have appropriated and used for purposes other than the irrigation as stated

above are necessary and sufficient for the uses for which they have been appropriated.

The above named parties who so appropriated water for irrigation have also used and in addition thereto are entitled and allowed to use water for livestock and domestic purposes, but only in such amounts as may be necessary for watering stock and for domestic purposes; provided that the priority in respect of the use of water for livestock and domestic purposes of any person shall be identical with the priority of such party for irrigation.

IT IS FURTHER ORDERED AND DECREEED that that certain agreement known as the Truckee River Agreement, dated July 1, 1935, entered into by the United States of America, party of the first part, Truckee-Carson Irrigation District, party of the second part, Washoe County Water Conservation District, party of the third part, Sierra Pacific Power Company, party of the fourth part, and such other users of the waters of the Truckee River as may have or shall become parties of the fifth part, which agreement provides (among other things) for the upstream storage of the waters of the Truckee River and its tributaries, be and the same is hereby approved, adopted by the Court and made a part of the decree and shall be binding as between the signatory parties to said agreement.

Water for irrigation is allowed to be used at any time, provided that the amount applied to the land during any calendar year shall not exceed the quantity in acre feet allowed to the land.

No owner or person or party entitled to the use of water under this decree shall be allowed to use for irrigation during any calendar month more than twenty-five per cent of the quantity of direct water in acre feet hereby allowed for the land for the season.

If it shall appear at any time in regard to the actual use and need of water for irrigatin that the amount hereinbefore estimated and allowed to be diverted from the river or stream into any ditch or canal is not sufficient after transportation loss to deliver to the land the flow allowed by this decree for application to the land, the allowance or flow as fixed by this decree for application to the land shall control, and there may, and hereby is allowed to be diverted from the stream a larger amount than the amount hereinbefore estimated for diversion from the stream, to the extent necessary to supply to the land, after actual transportation loss, the flow of water allowed by this decree for application to the land. Whether more or less than the amount hereinbefore estimated for diversion from the stream by any ditch, the quantity of water diverted for irrigation shall in every case be only such an amount as will supply to the land, after actual transportation loss, the amount of water allowed by this decree for application to the land and only the quantity needed for the irrigation thereof.

When any other user will thereby be deprived of any part of the water to which he is entitled, no ditch owner or user shall be allowed to divert away from the stream extra water for regulating the flow in any ditch.

The parties, persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other

waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree, and each and all of said parties, persons, corporations, intervenors, agents, attorneys, servants, assigns and successors in interest; and all persons claiming by, through or under them, are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Truckee River or its tributaries or with waters of any of the creeks or streams, or with any of the other waters hereinbefore mentioned, so as to in any manner prevent or interfere with the diversion, use and enjoyment of the waters of any of the other persons or parties as allowed or adjudicated by this decree, having due regard to the relative priorities herein set forth; and each of the said parties and persons and each of their agents, servants, attorneys and employees is hereby enjoined and restrained from ever taking, diverting, using or claiming any of the water so decreed, in any manner or at any time so as to in any way interfere with the prior rights of any other persons or parties having prior rights under this decree, as herein set forth, until such persons or parties having prior rights have received for their several uses the waters hereby allowed and adjudged to them.

Except as herein specifically provided no diversion of water into any ditch or canal, in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree. The amounts of water hereinbefore allowed are declared to be sufficient for the uses herein mentioned, and any and all use of water in excess of such decreed amounts is declared to be wasteful, and all wasteful or excessive use of water is hereby prohibited.

In any case where water is obtained from two or more sources, the aggregate amount of the combined waters from such sources which may be used, shall not exceed the amount required for such use as herein determined.

Whenever in this decree words of ownership are used in connection with any irrigated lands, such words shall not adjudicate, determine or affect any property rights therein, and this decree does not and shall not in any way determine the title to or rights in any property whatsoever, other than the rights to the diversion and use of water as herein determined and established. In the cases where, by this decree, water is allowed to be diverted through any ditch by the owner thereof for another party the conditions of any contractual relations existing between them are not hereby determined.

A Water Master shall be appointed by this Court to carry out and enforce the provisions of this decree and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Master, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch or canal owners or water users so disobeying or disregarding such proper orders, rules or directions, and the Water Master shall promptly report to the Court his said action in such case and the circumstances connected therewith and leading thereto. Whenever the necessities of the situation appear to the Court to so require, the Court shall authorize the employment by the Water Master of such person or persons to assist the Water Master as the Court may deem necessary to properly carry out the provisions of this decree and the orders of the Court. The terms of employment, expenses and compensation of said Water Master and his assistants, the payment

thereof and the means and methods for securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to time make. The compensation and expenses of the Water Master and his assistants shall be borne by the parties whose rights are adjudicated by this decree in the following manner, to-wit: One-third by the United States, one-third by the Sierra Pacific Power Company, and the remaining one-third by the remaining persons or corporations whose rights are adjudicated by this decree. Any person feeling aggrieved by any action or order of the Water Master may in writing and under oath complain to the Court, after service of a copy of such complaint on the Water Master, and the Court shall promptly review such action or order and make such order as may be proper in the premises.

The owner or owners of each ditch or canal herein authorized to divert water from the Truckee River or any of its tributaries, or from any ditch or canal or other waterway receiving water therefrom, shall, within sixty (60) days after the entry of this decree, or such lesser time as may be fixed by the Water Master, install and thereafter at all times properly maintain in such ditch, canal or other waterway, a reliable, sufficient and easily operated regulating headgate and locking and measuring devices, to be approved by the Water Master, whereby the water diverted into such ditch, canal or other waterway at any and all times may be properly regulated and correctly measured.

The stored water of any reservoir, including Lake tahoe, may be turned into and carried in the channel of any natural stream and mingled with the waters thereof and diverted therefrom for the proper uses of the persons or parties entitled thereto. The Water Master, upon timely notice, shall so regulate the headgates along the

streams and do and direct to be done such other things as may be needful to transport such stored water and deliver the same to the person or persons entitled thereto. All persons are hereby prohibited from in any way interfering with any such stored water while the same is being legally carried to the persons or parties entitled thereto.

The quantities of water permissible to be diverted by the owners of the several ditches, through said ditches, on account of the several priorities herein decreed, are decreed subject to the obligations of said owners to divert and use water only at such times as needed and only in such amounts as may be required under a reasonable, economical and beneficial use. Rotation, or the combining and exchanging of hte use of water between ditches and among users shall be permitted when necessary in order to obtain reasonable economy in the use of the water of the river or other streams, or in order to give to each ditch or user a more advantageous irrigation head, provided that such rotations shall not injuriously affect any of the rights determined and allowed by this decree. The Water Master may arrange for such rotations and consult with and endeavor to obtain the agreements of the various water users thereto, as the occasion may require and shall promptly report to this Court his actions in the premises.

All users of water allowed by this decree a flow of less than one inch per acre for his, her or their respective lands may, with the consent of the Water Master or by his direction to the owners or person in charge of the ditch through which the water is conveyed, use when needed for the irrigation of his, her or their land, a larger flow than specifically allowed by this decree, up to and not exceeding one inch per acre, provided the amount of water used during any calendar year shall not exceed the seasonal acre feet

allowance for the land, and that the flow allowed would not, if continuous, deliver in any one month in excess of twenty-five (25) per cent of the seasonal allowance in acre feet heretofore in this decree specifically allowed for said lands.

Whenever any person or party shall not be receiving the amount of water to which he is entitled under this Decree, the Water Master shall, upon request, open, close, lock and regulate the necessary headgates, ditches and other works used for the diversion and application of such waters as to apportion the same as herein provided, and for that purpose may enter upon the lands of any and all persons having rights adjudicated by this Decree.

Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversin and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.

The State of Nevada is not a party to this suit but the rights of the State to water through different ditches which divert from the Truckee River for th State and numerous parties to this action have been estimated for convenience and purposes of administration.

The several parties to this suit shall pay and bear their own costs.

Said Sierra Pacific Power Company is the identical party and corporation referred to herein and in the "Temporary Restraining Order" made and entered in said cause on February 13, 1926, as the "Truckee River General Electric Company, a corporation", the name of said corporation having been heretofore changed, pursuant to law,

from the Truckee River General Electric Company to Sierra Pacific Power Company.

The foregoing adjudications set forth in Claims Numbers 1 to 744, inclusive, of this Decree are based upon conditions existing at or prior to the entry of said Temporary Restraining Order herein on February 13, 1926; and such adjudication shall not be deemed to limit, reestablish, or otherwise affect any rights acquired, created or lost subsequently thereto by conveyance, transfer, abandonment, non-user, contract (including said Truckee River Agreement) or otherwise, but the rights of the United States shall be as herein adjudicated as of the date of this decree save only as the same may be affected by said Truckee River Agreement.

Done in open court this 8th day of September, 1944.

FRANK H. NORCROSS, District Judge.

United States of America, Plaintiff, v. Alpine Land & Reservoir Company, a Corporation, Defendant, and Nevada State Engineer, Defendant-Appellee, Pyramid Lake Paiute Tribe of Indians, Applicant-Appellant, Truckee-Carson Irrigation District; Water Right Transfer Applicants, Applicants-Appellees.

No. 90-16460
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
983 F.2d 1487 (9th Cir. 1992)
Argued and Submitted June 26, 1991,
Decided May 26, 1992
As Amended January 21, 1993

Opinion by Judge Brunetti.

The Pyramid Lake Paiute Tribe of Indians (the "Tribe") protested the application of farmers in the Newlands Federal Reclamation Project (the "Project") to transfer water rights. The Nevada State Engineer (the "Engineer") approved the applications and the district court affirmed. We affirmed in part, reversed in part, and remanded in *United States v. Alpine Land &*
Reservoir Co., 878 F.2d 1217 (9th Cir. 1989).

On remand, the district court again [**2] affirmed the Engineer's approval of the application. The Tribe again appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291 and reverse and remand.

I.

In 1980, the District Court of Nevada approved a proposed decree ("*Alpine Decree*" or "decree") submitted by a Special Master declaring the rights of all interested parties to water from the Carson River and its tributaries. *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), aff'd as modified, 697 F.2d 851 (9th Cir.) ("*Alpine I*"),

cert. denied, 464 U.S. 863 (1983). Once the decree became final, many Project farmers filed applications to transfer water rights appurtenant to other Project land ("transferor properties") to their land ("transferee properties").[1] While the transferor properties are not presently using their appurtenant water rights, the transferee properties are lands "lacking water rights but which long have been irrigated with Project water." *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1219 (9th Cir. 1989) ("*Alpine II*").

The Tribe filed timely protests to the transfer applications in accordance with the provisions of the decree and Nevada statutes.[2] The protests were based on several grounds. Relevant to this appeal is the Tribe's claims that twenty-five of the applications involve water rights which were never perfected or were abandoned or forfeited under Nevada law.

The Engineer rejected the Tribe's protests and approved all

---

[1]From 1927 to 1969 the Newlands Project was operated by appellee Truckee-Carson Irrigation District. During this time, with the apparent acquiescence of TCID, transferee property landowners used Project water even though they had no contract or certificate entitling them to do so. *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1222 (9th Cir. 1989).

[2]The area surrounding Pyramid Lake is the aboriginal home of the Tribe and the present site of the Pyramid Lake Indian Reservation. Pyramid Lake's sole source of water is the Truckee River. Because of the diversion of water from the Truckee River for use by Project landowners, the surface area of the Lake has decreased over the years, threatening the survival of indigenous fish species, including the cui-ui sucker and the Lahontan cutthroat trout. *Alpine II,* 878 F.2d at 1219-20. The Tribe contends that the proposed transfers violate various aspects of Nevada law and seeks to nullify these proposed transfers, claiming that the result will decrease the Project's net consumption of Truckee River water and thereby increase the water flow into Pyramid Lake. *Id.* at 1221.

applications. The Engineer made no specific findings regarding the transferor property water rights. Rather, the Engineer considered the issues of perfection, abandonment, and forfeiture on a Project-wide basis only. "The record of evidence," the Engineer found,

> indicates that the water has been used continuously by project farmers. The fact that individual project farmers were not using the water on the exact acreage for which they contracted on an acre-for-acre accounting was addressed and disposed of in Alpine [I].

Engineer's Ruling at 14 (Sept. 30, 1985). The Engineer, relying on *Alpine I,* thus found the transferor property water rights were valid regardless of the alleged failure to perfect the water rights on the transferor property so long as water was beneficially used, albeit improperly, somewhere on Project land. Based on this Project-wide analysis, the Engineer concluded "there was neither intent to abandon nor intent to forsake the water or the right to use it." *Id.* at 15. The Engineer also held that the transferor water rights were not subject to Nevada's forfeiture statute because they had vested in the United States upon the creation of the Project in 1902, prior to passage of Nevada's forfeiture statute.

The Tribe, pursuant to the procedures set forth in the decree and approved by us in *Alpine I,* appealed the Engineer's decision to the district court. The district court did not discuss the merits of the Engineer's ruling on perfection, abandonment, and forfeiture, finding these issues "were improperly raised before the Engineer." The district court reasoned that, under the decree, these claims should have been brought before the Water Master. The Tribe then appealed the district court's decision to this court.

In *Alpine II,* we found that the Engineer could, under the decree, "consider the Tribe's objection that the applications should be rejected due to alleged forfeiture or abandonment," *Alpine II,* 878 F.2d at 1225. We found that it was error for the district court to conclude that Nevada law is

wholly irrelevant and that it is inappropriate for the Engineer to adjudicate the issues of perfection, forfeiture or abandonment, and we remanded to the district court with instructions to evaluate the Engineer's ruling on the applicability of Nevada's statutory forfeiture provisions and lack of intent to abandon. *Id.* at 1229.

We also rejected the Engineer's validation of the transferee properties' use of water. The *Alpine* decree, we stated, did "not determine[ ] whether the particular Project properties involved in this case are entitled to receive Project water." Id. at 1220-21. *Alpine I* did not, as the Engineer believed, recognize an informal transfer of water rights to the transferee properties or the inapplicability of Nevada's forfeiture statute. Id. at 1228-29. Although we stated in *Alpine I* that "historically, no distinction was made between landowners with and without limiting contracts," *Alpine I,* 697 F.2d at 856, our analysis "was premised on the contractual rights of the farmers to receive Project water in some amount, rights [the transferee property landowners] simply do not have." *Alpine II,* 878 F.2d at 1228.

On remand, the district court, without further briefing, fact finding, or a hearing on the matter, affirmed the Engineer's findings. The court quoted the Engineer's ruling at length, including those aspects of the ruling rejected in *Alpine II,* and concluded that the Engineer's analysis was "eminently correct." The district court did not address the Tribe's claim that the water rights were not perfected. The Tribe timely filed this appeal.[3]

II.

The Tribe protested the transfer applications on the ground that the "applications involve the transfer of alleged water rights that were never

---

[3]The Tribe also filed a motion to certify certain questions raised in this appeal to the Nevada Supreme Court. The appellants oppose the motion. Because the law of Nevada is clear, see *Alpine II,* 878 F.2d at 1226, we decline to certify the questions suggested by the Tribe. See *In re McLinn,* 744 F.2d 677, 681 (9th Cir. 1984).

perfected in accordance with federal and state law." The Tribe argues that the district court, on remand from *Alpine II,* improperly failed to consider the Engineer's findings regarding this allegation. Appellee TCID argues that the district court had no obligation, under Alpine II, to consider the Tribe's perfection claim, and that the issue is, therefore, not properly before this court.[4]

A

[1, 2] On remand, the district court "must proceed in accordance with the mandate and such law of the case as was established by the appellate court." *Firth v. United States,* 554 F.2d 990, 993 (9th Cir. 1977). See also *Colville Confederated Tribes v. Walton,* 752 F.2d 397, 401 (9th Cir. 1985) (on remand, district court shall act in accordance with the mandate "in light of [the] opinion" (internal quotations omitted)), cert. denied, 475 U.S. 1010, 89 L. Ed. 2d 300, 106 S. Ct. 1183 (1986). The concluding paragraph of *Alpine II* states:

> The district court's error was to conclude that Nevada law is wholly irrelevant, and that it is inappropriate for the Engineer to adjudicate the issues of *perfection, forfeiture, or abandonment.* Upon remand, the district court must evaluate the merits of the Engineer's ruling that Nevada's statutory *forfeiture* provisions do not apply and his finding that under Nevada's common law of *abandonment* the transferor landowners have not indicated an intent to abandon their water rights.

878 F.2d at 1229 (emphasis added). TCID quotes the second sentence of this paragraph in isolation to support its argument that the district court was instructed to consider the issues of forfeiture and abandonment only.

---

[4]The Engineer concedes that the perfection issue was within the scope of the *Alpine II* remand. Appellee Engineer's Opening Brief at 2 n.1.

We reject TCID's argument, as *Alpine II* clearly required the district court to review the Engineer's ruling regarding the perfection claim. It would make little sense to hold, in *Alpine II,* that the district court erred by failing to consider the perfection issue, remand the case, then now hold that the failure to again consider the issue was not erroneous.

A reading of *Alpine II* in its entirety also supports the Tribe's view. In *Alpine II,* we considered the Tribe's claims of lack of perfection, abandonment, and forfeiture in the context of a single issue: whether the district court erred by failing to address these claims. We held that such failure was indeed error. *Id.* at 1227-28. The mere failure to specify each of the unaddressed claims in the concluding sentence of the opinion does not excuse the district court from considering the claims on remand, as those claims are the basis for the *Alpine II* analysis and holding regarding transferability of the water rights. The subject of the litigation is the transfer of water rights within the Newlands Reclamation Project in Nevada, *id.* at 1219, and the State Engineer has no right to transfer water rights which have never been put to beneficial use. "An appropriator obtains a transferable water right only to the extent that he has put his appropriation to a beneficial use." *Id.* at 1226 (quoting *Basin Elec. Coop. v. State Bd. of Control,* 578 P.2d 557, 563-64 (Wyo. 1978)). In *Alpine I,* we reviewed the legislative history of the 1902 Reclamation Act. We found that under Section 8 of the Act "appropriated water must be applied to irrigation; it cannot be severed as a commodity for use on land to which it would not be appurtenant." *Alpine I,* 697 F.2d at 858. Representative Mandell described a water right under the Act as only extending "'to the use of the water on and for the tract originally irrigated'; there is no general 'property in water with power to sell and dispose of the same elsewhere and for other purposes than originally intended.'" *Id.* (quoting 35 Cong. Rec. 6679 (1902)).

The issue of perfection was specifically before the district court on remand and the district court's failure to address this issue was erroneous.

B

The Engineer argues that the district court's failure to consider the lack of perfection claim on remand is harmless because, under Nevada law, a water right need not be perfected in order to be transferred.

[3] Nevada water law is "special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided." *Application of Filippini,* 66 Nev. 17, 202 P.2d 535, 540 (Nev. 1949). *See also United States v. Cappaert,* 508 F.2d 313, 319 (9th Cir. 1974) (Nevada water rights may only be acquired as provided by statute), *aff'd,* 426 U.S. 128, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976); Nevada Revised Statutes (NRS) 533.040 (water rights may be transferred "in the manner provided in this chapter, and not otherwise"). The statutes setting forth the procedure for transferring water rights in Nevada refer to "changing the place of diversion, manner of use or place of use of *water already appropriated*." NRS 533.325 (emphasis added); *see also* NRS 533.345, 533.425. The Engineer concedes that this issue depends upon the interpretation of "water already appropriated" and argues the phrase "means all rights to the use of water, including inchoate rights such as permits where the water has not yet been put to beneficial use." Engineer's Supplemental Brief at 4. The Tribe asserts that appropriation is synonymous with perfection, which requires the actual application of the water to beneficial use on the property. *See Nevada v. United States,* 463 U.S. 110, 126, 77 L. Ed. 2d 509, 103 S. Ct. 2906 (1983) ("the law of Nevada, in common with most other Western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land"); *Alpine I,* 503 F. Supp. at 885 (the nature of a water right is such that it takes time to perfect the right; when any work is necessary to complete the appropriation, the law gives a claimant a reasonable time to do it, and the appropriation is not deemed complete until the actual diversion or use of water)

[4, 5] In *In re Manse Spring,* 108 P.2d 311 (Nev. 1940), the

Nevada Supreme Court stated: "To constitute a valid appropriation of water, there must be an actual diversion of it, with intent to apply to beneficial use, followed by an application to such use in a reasonable time." *Id.* at 314 (quoting *Walsh v. Wallace,* 67 P. 914 (Nev. 1902));[5] *see also* NRS 533.035 ("beneficial use shall be the basis, the measure and the limit of the right to the use of water"), NRS 533.070 (the quantity of water that may be appropriated "shall be limited to such water as shall reasonably be required for the beneficial use to be served"). The definition of appropriation in *Manse Spring* is consistent with the plain meaning[6] of the phrase in western water law. See 1 Robert E. Clark, *Waters and Water Rights* § 19.2 (1967) (appropriation requires "reasonable beneficial use"); 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States,* 157 (1971) (appropriation "contemplates the acquisition of rights to the use of water by diverting water and applying it to reasonable beneficial use for a beneficial purpose"); Tarlock, *Law of Water Rights and Resources,* §§ 5.15, 5.16 (1990) (physical diversion and beneficial use are essential elements of a valid appropriation); *Black's Law Dictionary* 93 (5th ed. 1979) (appropriation of water "consists in the capture, impounding, or diversion of it . . . and its actual application to some beneficial use").

[6] The Engineer provides no authority for its broad interpretation of "water already appropriated" and our research reveals none. In *Alpine II*

---

[5]In cases where beneficial use may be made of the water without diverting it, beneficial use alone is sufficient to constitute appropriation. *Nevada v. Morros,* 104 Nev. 709, 766 P.2d 263, 267 (Nev. 1988) ("Nevada water law recognizes and permits water appropriation in situ, without a diversion, for public recreation purposes").

[6]Under Nevada law, "words should be given their plain meaning unless this violates the spirit of the act." *Application of Filippini,* 66 Nev. 17, 202 P.2d 535, 538 (Nev. 1949).

we accepted the Tribe's argument that the law of Nevada requires that for the perfection of a water right for agricultural purposes the water must be beneficially used by actual application on the land, and that the only transferable water right is one that has been appropriated to a beneficial use. See *Alpine II,* 878 F.2d at 1226. We fully explored this issue in *Alpine II,* and we will not revisit it here.

[7] The Engineer also relies on NRS 533.370(3), which describes certain circumstances under which the Engineer is required to reject the application.[7] The failure to beneficially use the water is not among the listed circumstances and, the Engineer argues, "only the factors of section 533.370(3) preclude the State Engineer from granting a transfer application when a water right exists." This section, however, does not provide the sole criterion for rejecting applications. *See Alpine II,* 878 F.2d at 1227 (citing NRS 533.070, 533.040). In addition, we do not find this statute and the requirement of beneficial use inconsistent. We read NRS 533.370(3) as providing criteria for rejecting applications to transfer rights to water which is "already appropriated." An application to transfer rights to water not already appropriated - i.e., not beneficially used on the transfer property - would not constitute a proper application and therefore be ineligible for consideration under this section.

Under Nevada law, the appropriation of water requires, at a minimum, the actual application of the water on the transferor property to beneficial use. Because Nevada's statutory procedure for transferring water rights requires the prior appropriation of the water, the district court's

---

[7]NRS 533.370(3) provides in pertinent part:
Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for.

failure to consider this issue on remand was not harmless.

C

Merely addressing the Engineer's ruling regarding the Tribe's claim of lack of perfection would be insufficient; the correct law must also be applied. The Engineer's Project-wide analysis of beneficial use was rejected in *Alpine II.* Without this "informal transfer" theory, there is no basis, in the absence of further fact finding, for concluding the transferee properties have rights to water. *Alpine II,* 878 F.2d at 1228-29. On remand, the fact finder must determine whether the specific water rights sought to be transferred are rights to "water already appropriated" as we have construed this phrase.

III.

The parties agree that Nevada's common law of abandonment applies to this case. The Tribe argues that the Engineer and the district court based their abandonment findings on an incorrect legal standard. The appellees, though conceding that the basis for the Engineer's finding was incorrect, argue that substantial evidence supports his finding.

[9-12] Abandonment of a water right "is the relinquishment of the right by the owner with the intention to forsake and desert it." *Manse Spring,* 108 P.2d at 315 (quoting 2 *Kinney on Irrigation and Water Rights* § 1118 at 2020 (2d ed.)). The issue of abandonment is "a question of fact to be determined from all the surrounding circumstances." *Revert v. Ray,* 95 Nev. 782, 603 P.2d 262, 264 (Nev. 1979). Nonuse of water by the owner of a water right is some evidence of an intent to abandon the right. *Franktown Creek Irrigation Co. v. Marlette Lake Co.,* 364 P.2d 1069, 1072 (Nev. 1961); *Manse Spring,* 108 P.2d at 316.[8]

---

[8]The Tribe, relying on authority from other western states, argues that a substantial period of nonuse creates a rebuttable presumption of abandonment. Though the longer the period of nonuse, the greater the likelihood of abandonment, we find no support for a rebuttable

[13] The decree provides that the decision of the Engineer "shall be prima facie correct, and the burden of proof shall be upon the party challenging the Engineer's decision." *Alpine Decree,* Administrative Provisions Par. 7; *see also* NRS 533.450(9) (same). We review the Engineer's findings on abandonment for an abuse of discretion. *State Engineer v. Curtis Park Manor Water Users Ass'n,* 101 Nev. 30, 692 P.2d 495, 497 (Nev. 1985); *Revert,* 603 P.2d at 264, 265.

The Engineer found that the use of water "by Project farmers" was sufficient to find the absence of intent to abandon the water rights appurtenant to the transferor properties. Relying on our decision in *Alpine I,* the Engineer apparently believed "that this court has accepted the de facto transfer of water rights to Project properties lacking water rights." *Alpine II,* 878 F.2d at 1228. We expressly rejected this reasoning in *Alpine II,* stating that *Alpine I* "in no way approved the so-called 'informal transfer' of water rights." *Id.* "The critical defect with the transferee properties," we stated, "is that they generally have no right to receive Project water. The landowners do not hold contracts or certificates entitling [the transferee] properties to be irrigated." *Id.* at 1229. The proper inquiry for the Engineer and the district court, therefore, is whether the individual transferor water rights were abandoned by the transferor property owners. Because the Engineer did not apply the correct law in determining intent, he has abused his discretion. For the same reason, the district court's approval of the Engineer's findings is erroneous.

The Engineer argues that there is substantial evidence to support his findings when the correct analysis is applied. We, however, are not in a position to evaluate facts not considered or found below. The Engineer's argument only illustrates the need for further determinations by a proper fact finder.

IV.

---

presumption under Nevada law.

We next consider the applicability of the Nevada statute providing for the forfeiture of water rights. The only requirement to prove forfeiture of water rights is to show a failure to use the water beneficially for five successive years. See NRS 533.060(2). Forfeiture thus differs from common law abandonment because an intent to relinquish a right is not required for forfeiture. *Manse Spring,* 108 P.2d at 315. Under Nevada law, however, the forfeiture statute does not apply to water rights that vested before March 22, 1913, when the statute took effect. *See* NRS 533.085;[9] *Manse Spring,* 108 P.2d at 316.

The Engineer found that the forfeiture statute did not apply to the transferor property water rights because "the existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authorized Lahontan Dam in 1902." Engineer's Ruling at 14.

The district court affirmed the Engineer's approval of the transfer applications, but not because it agreed that Nevada law made the forfeiture statute inapplicable. Instead, the district court adopted an alternative rationale that Nevada law generally did not apply.

We rejected this theory in *Alpine II* and determined that Nevada law does apply to the proposed transfers. We instructed the district court to "evaluate the merits of the Engineer's ruling that Nevada's statutory forfeiture provisions do not apply." *Alpine II,* 878 F.2d at 1229. On remand, the district court found that the Engineer's conclusion that the Nevada statutory forfeiture provisions were inapplicable was "eminently

---

[9]Section 533.085 provides in pertinent part:
Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

correct" because, the district court found, the rights vested in 1902.

[17] The district court erred by assuming that all the water rights in question vested when the United States obtained water rights for the Project in 1902.[10] This amalgamation of water rights, obtained by the United States for the entire Project, is not the relevant set of rights. Instead, the rights at issue are the rights appurtenant to particular tracts of land that are the subject of the twenty- five contested transfer applications.

[18-19] Determining when those rights vested is a matter of Nevada law. Vested water rights are those that have "become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provided by the water law, and [are] regarded and protected as property." *Filippini,* 202 P.2d at 537. A water right may vest upon diversion and beneficial use, by permit "procured pursuant to the statutory water law relative to appropriation," or by "an actual diversion . . . with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time." *Id.* at 537-38 (internal quotations omitted).

The individual water rights at issue here were delivered by contract by the United States from its accumulated water rights in the Project to the transferor landowners. For the reasons discussed above, the rights could become vested in the individual landowners only upon becoming appurtenant to a particular tract of land.

[20] According to the Nevada Supreme Court, the Nevada

---

[10]"In the early stages of the Newlands Project the United States acquired by contract the vested water rights to 29,884 acres of land with priority dates from 1865 to 1902. These rights were conveyed to the United States by private land owners in exchange for the government's promise to deliver Project water to these farms." Alpine I, 503 F. Supp. at 881. In addition to these conveyances, Congress authorized the withdrawal of over 200,000 acres from public lands to create the Project.

legislature included the provision exempting pre-1913 rights from impairment "to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act." *Manse Spring,* 108 P.2d at 315.

> Prior to 1913 the law said that the water users of that day would have and hold the use of such water until the same should be abandoned, and, as we have seen, in abandonment the intent of the water user is controlling. To substitute and enlarge upon that by saying that the water user shall lose the water by failure to use it for a period of five years, irrespective of the intent, certainly takes away much of the stability and security of the right to the continued use of such water.

Id. at 316. In other words, a water right that can be lost through mere non-use is something less than a water right that may be lost only through intentional abandonment. The Nevada legislature did not want to diminish the pre-1913 rights.

The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in *Manse Spring* that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source. Accordingly, with the purpose of the statute in mind, it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land.

As there has been no factfinding regarding the individual water rights, we do not know at this time whether any of the water rights sought to be transferred were originally granted to the transferors by the United States prior to 1913 and further do not know if the water was beneficially applied.

Our conclusion that the individual rights at issue here did not vest in 1902 when the United States obtained Project-wide rights is not in conflict with our earlier decisions. The Engineer argues that this court has already held that the farmers' rights vested in 1902. In *Alpine I,* we stated:

> The district judge found that under the Nevada "relation back" doctrine, the 1903 statute did not affect the Project farmers' rights which had vested in 1902. We do not find this decision of the district court on the law of its own state incorrect.

697 F.2d at 855. We were considering the question of whether a 1903 Nevada statute limiting the quantity of water that could be diverted per acre of irrigated land could limit the water duties for Project farmlands. In the district court, the parties had *stipulated* for the purposes of that question that the priority date of the Newlands irrigation rights was July 2, 1902. *See* 503 F. Supp. at 885. Thus the issue of the date of vesting was not before the court; the issue was whether the statute could limit the duties *assuming* a priority date of 1902.

On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether and when the right vested, and under which law appropriation was initiated. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.

V.

[21] The district court erred by failing to consider the Tribe's claim that the water rights were never perfected and by approving the Engineer's findings on abandonment and forfeiture. In accordance with this opinion and the decision in *Alpine II,*[11] we remand for determination of

---

[11]The issues of perfection, abandonment, and forfeiture in this case can properly be determined by either

whether: (1) the water rights appurtenant to the transferor properties at issue have been perfected, (2) the holders of the water rights sought to be transferred abandoned the water rights appurtenant to the transferor properties; and (3) the specific water rights sought to be transferred have been forfeited if the specific water rights vested after March 22, 1913.

REVERSED AND REMANDED

---

the Engineer or a federal Water Master appointed by the district court. *Alpine II,* 878 F.2d at 1225. In *Alpine II,* we stated, "following remand, the district court is free either to refer this matter to the Water Master, or to rule on it in the first instance." *Id.* at 1228 n.15. We again leave to the district court's discretion the decision of the appropriate factfinder.

THE UNITED STATES OF AMERICA, Plaintiff, vs. ALPINE LAND AND RESERVOIR CO., et al., Defendant(s).

CIVIL NO. D-184-HDM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

27 F. Supp. 2d 1230; 1998 U.S. Dist.

September 2, 1998, Decided

September 2, 1998, Filed; September 3, 1998, Entered & Served

OPINION BY:

Howard D. McKibben

ORDER

On December 22, 1997, the Nevada State Engineer issued its Ruling On Remand # 4591. The United States and the Pyramid Lake Paiute Tribe ("Tribe") appeal that ruling.

The history of this litigation is detailed in *United States v. Alpine Land & Reservoir Co.,* 503 F. Supp. 877 (D.Nev. 1980), aff'd as modified, 697 F.2d 851 (9th Cir. 1983) ("*Alpine I*"), *United States v. Alpine Land & Reservoir Co.,* 878 F.2d 1217 (9th Cir. 1989) ("*Alpine II*") and *United States v. Alpine Land & Reservoir Co.,* 983 F.2d 1487 (9th Cir. 1993) ("*Alpine III*"). In *Alpine III,* the Ninth Circuit remanded this action to the district court to make the following determinations, on a parcel-by-parcel basis, with respect to each transfer application at issue: (1) whether the water rights appurtenant to the transferor properties at issue have been perfected; (2) whether the holders of the water rights sought to be transferred abandoned the water rights appurtenant to the transferor properties; and (3) whether the specific water rights sought to be transferred have been forfeited, if the specific water rights vested or were initiated after March 22, 1913. The Ninth Circuit left it to this court's discretion whether to conduct the factual determinations itself or to appoint the State Engineer or a federal Water Master.

On April 13, 1995, this court issued the following order:

> This action is remanded forthwith to the Nevada State Engineer to consider all applications and make determinations on the issues of perfection, abandonment and forfeiture. Should the State Engineer decide additional evidence is required, he shall afford the parties the opportunity to present such evidence. The State Engineer shall then certify the record to this court to decide whether or not the findings of the State Engineer are based on the relevant facts and applicable law.

Thereafter, the Engineer issued a briefing schedule and a timetable for the exchange of evidentiary materials between the parties. On August 30, 1996, the Engineer issued Interim Ruling No. 4411, in which the Engineer concluded: 1) the Tribe was not precluded by the doctrine of res judicata from being heard on the issues of lack of perfection, abandonment and forfeiture; 2) the Engineer had the authority to consider the issues of lack of perfection, abandonment and forfeiture; 3) the Engineer would act on the applications before him as ordered by the court; 4) Nevada law does not shift the burden of proving lack of abandonment to the applicants upon the protestant's showing of an extended period of nonuse; and 5) NRS § 533.324, which became effective subsequent to the decision in *Alpine III,* precluded the need for perfection of the water rights that are the subject of the transfer applications prior to the transfer of said rights. On September 23, 1996, the Tribe filed a motion for partial reconsideration regarding the Engineer's ruling on perfection. In Ruling # 4591, the Engineer affirmed his conclusion that the court in *Alpine II* misinterpreted Nevada law when it held that all water rights in Nevada must be perfected prior to transfer. However, the Engineer further concluded that all unperfected water rights are not available to be transferred. The Engineer determined that if the Tribe proves a water right was not perfected prior to the filing of one of the transfer applications, the issue becomes whether

that particular water right is still within the diligence phase of development. If the answer is yes, the unperfected water right can be moved; however, if the water right is not within the diligence phase, the unperfected water right is not available for the transfer, as it does not comport with the common law doctrines of due diligence and relation back.

Evidentiary hearings were held in 1996 and 1997. On December 22, 1997, the Engineer issued its Ruling on Remand # 4591, which considered fourteen (14) applications, consisting of fifty-six (56) transferor parcels.[1] In addition to the Engineer's factual findings on a

---

[1] The Tribe's original appeal to federal court included Group 1 consisting of 58 applications; Group 2 consisting of 44 applications; and Group 3 consisting of 27 applications (129 total). In Alpine II, the Ninth Circuit held that the Tribe was precluded from challenging the forfeiture and abandonment of 104 of the applications because it failed to protest these before the Engineer. The 27 applications in Group 3 became the "original 25" after excluding Applications 47822 and 47830, which were not protested on the grounds at issue. The "original 25" applications were protested on the grounds of perfection, abandonment and forfeiture. Several permits granted or protests filed on the original 25 are no longer in existence. Permit 48422 was canceled by the Engineer and no timely appeal was taken. The Tribe withdrew its protests to Applications 48767 and 48866. Water applicants withdrew permits 48470, 48471, 48665 and 48827. Pursuant to a motion to consolidate Group 3 applications with Group 7, the Engineer held applications 47809, 48465, 48466, and 48669 aside to be heard later with the Group 7 applications. Thus, the Engineer's findings on 14 out of the original 25 applications are currently before the court.

The fourteen applications under consideration in Ruling # 4591 are: 47840 (Mills), parcels 1-21, 48468 (Fritz), parcels 1-6; 48668 (Gaylord), parcel 1; 48828 (Inglis), parcel 1; 48647 (Whitehead), parcel 1-2; 48672 (Lohse), parcel 1-2; 48673 (Payne), parcels 1; 48424 (Dalton), parcel 1; 48666 (Craig), parcels 1-4; 48667

parcel-by-parcel basis, the ruling consisted of twelve (12) general findings of fact and four (4) general conclusions of law. Where applicable, the Engineer adopted and incorporated these general findings and conclusions when considering the issues of perfection, abandonment and forfeiture on a parcel-by-parcel basis.

Specifically, the Engineer determined that for thirty-eight (38) parcels, no water had been applied to beneficial use for periods ranging from five (5) years to thirty-six (36) years prior to the filing of the application to transfer the water right. For eight (8) other parcels, the Engineer found that the Tribe had proved that some portion of the land had not been irrigated for a substantial number of years, but that the Tribe had failed to present evidence of the exact location of the unirrigated land. On the remaining parcels, the Engineer found the Tribe had failed to prove nonuse of the water by clear and convincing evidence.

The Engineer also made findings regarding the land use of the transferor parcels. For a majority of the thirty-eight (38) existing places of use where the Engineer found no water had been applied to beneficial use and the eight (8) parcels where the Engineer found partial nonuse, the Engineer determined that the evidence before him clearly showed that they were comprised of paved highways and roads, natural vegetation, bare land, residential areas and canals and drains.

With respect to the issues of perfection, forfeiture and abandonment, the Engineer found that the water right on one (1) parcel had not been perfected, the water rights on two (2) parcels could not be transferred, and that no water rights sought to be transferred had been abandoned or forfeited. The three parcels which the Engineer concluded could not be transferred belong to Application 47840 (Mills), parcels 5, 11 and 12. As to parcel 5, the Engineer stated "the water right was never

---

(Edson), parcels 1, 2, 5 & 7; 48825 (Emery), parcel 1; 48467 (Gerdamann), parcels 1-2; 48423 (Hoeksema), parcels 1-3; 48865 (Rambling River), parcels 1-7.

perfected on this parcel from the time of the contract in 1951 through the filing of the change application in 1984, a period of 33 years. The State Engineer further finds in the absence of evidence to the contrary a lapse of 33 years does not demonstrate due diligence in placing the water to beneficial use; therefore, there is no water right that can be related back under the doctrine of relation back and there is no water right available to be transferred from this parcel." With respect to parcels 11 and 12, the Engineer could not determine what the contract dates were. The Engineer concluded, therefore, that there was insufficient information to determine the Tribe's claims of lack of perfection, forfeiture or abandonment or to allow the transfer of the water rights.

On January 16, 1998, the United States filed its Petition for Review and Notice of Appeal of Ruling # 4591.[2] The United States specifically objects to the following general findings of fact and general conclusions of law: (1) General Finding of Fact I; (2) General Finding of Fact IX; (3) General Finding of Fact XII; (4) General Conclusion of Law II; and (5) General Conclusion of Law IV. In addition, the government contends that based on the Engineer's uncontroverted findings regarding the nonuse of water for a substantial period of time, combined with uncontroverted findings of a land use inconsistent with irrigation, more than half of the water rights at issue have been forfeited or abandoned.[3]

---

[2]The applicants' contention that the United States lacks standing to appeal Ruling # 4591 is without merit.

[3]The United States specifically contends that the water rights sought to be transferred in the following applications are abandoned and/or forfeited, in whole or in part, and, therefore, ineligible for transfer:

47840 (Mills) --parcels 1-20 (except parcels, 5, 11 and 12 already invalidated)
48468 (Fritz) --parcels 1-6
48668 (Gaylord) --parcel 1

[1] On January 14, 1998, the Tribe filed its Notice of Appeal of Ruling # 4591. The Tribe appeals on the following grounds: (1) the Engineer should not act as a fact-finder on remand;[4] (2) the Engineer failed to apply the doctrine of beneficial use; (3) the Tribe was denied the discovery tools necessary to obtain important evidence; (4) General Conclusion of Law IV; (5) the rebuttable presumption of intent to abandon should have been applied; (6) General Finding of Fact XI; (7) General Finding of Fact X; and (8) certain factual findings regarding specific parcels.

No water right applicant has filed an appeal of Ruling # 4591. Specifically, no applicant has contested the Engineer's factual findings with respect to nonuse of water or the land use for the transferor properties.

DISCUSSION

[2-5] On remand, the district court "must proceed in accordance with the mandate and such law of the case as was established by the appellate court." *Firth v. United States,* 554 F.2d 990, 993 (9th Cir. 1977).

48647 (Whitehead) --parcels 1 and 2
48672 (Lohse) --parcel 2
48666 (Craig) --parcels 1-4
48667 (Edson) --parcel 7
48467 (Gerdamann/Rebol) --parcels 1 and 2
48423 (Hoeksema/Cook) --parcel 1

The United States made no objections to the following transfer applications: 47840 (Mills), parcel 21; 48828 (Inglis); 48672 (Lohse), parcel 1; 48673 (Payne); 48424 (Dalton); 48667 (Edson), parcels 1, 2 & 5; 48825 (Emery); 48423(Hoeksema), parcels 2 & 3, and 48865 (Rambling River).

[4]On appeal, the Tribe has once again moved to disqualify the State Engineer on grounds of bias. After reviewing Ruling # 4591, however, the court believes the Engineer made the factual determinations in both an unbiased and commendable manner. The Engineer will remain as factfinder for all pending transfer applications.

The law of the case doctrine provides that "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *U.S. v. Alexander,* 106 F.3d 874, 876 (9th Cir. 1997). However, a court may have discretion to depart from the law of the case if: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. *Id.* A court's "failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.*

This court entered an order of remand to the State Engineer for determinations on the issues of perfection, abandonment and forfeiture, which were to be based on relevant facts and applicable law. The Engineer is bound by the mandate set forth in Alpine III and the law of the case doctrine.

[6, 7] The Engineer's interpretation of the law set forth in Alpine III and any new questions of law will be reviewed de novo. *Town of Eureka v. State Engineer,* 108 Nev. 163, 165, 826 P.2d 948 (1992). The Engineer's factual findings, however, "shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." Alpine Decree, Administrative Provisions P7; NRS § 533.450(9). On issues of fact, the reviewing court must limit itself to a determination of whether substantial evidence in the record supports the Engineer's decision. *Town of Eureka,* 108 Nev. at 165.[5]

I. Specific Objections to the Engineer's Factual Findings

In addition to its objections to the Engineer's legal conclusions on the issues of forfeiture and abandonment, the Tribe contests certain factual findings by the Engineer.

---

[5]The court finds no authority for the appellants' contention that the Engineer's factual findings should be reviewed *de novo*.

[8] For eight (8) parcels, the Tribe submitted evidence that only a portion of the existing place of use had been irrigated.[6] The applications are: 48672 (Lohse), parcel 1; 48673 (Payne), parcel 1; 48825 (Emery), parcel 1 and 48865 (Rambling River), parcels 1-5. Generally, partial nonuse results in partial abandonment or partial forfeiture. *State v. Hagerman Water Right Owners,* 130 Idaho 727, 947 P.2d 400, 408 (Id. 1997).

However, on each of the parcels, the Engineer ruled that the Tribe had failed to provide clear and convincing evidence of the specific location of the unirrigated land. For example, on the issue of forfeiture on Application 48673 (Payne), parcel 1, the Engineer ruled:

> However, the State Engineer finds there is not clear and convincing evidence as to the exact location or the quantity of acres in the 3.2 acre portion of the parcel the protestant alleges were not irrigated from 1962 through 1984. Based on this lack of evidence of specific location of lands where non-use was alleged and the fact that the amount of land changed over time, the Protestant did not provide clear and convincing evidence as to the non-use on a specific portion of the 3.2 acres . . . .

The Tribe contends the Engineer had a "statutory obligation to

---

[6]The government does not join in the appeal of these factual findings. However, there is a 9th parcel in which the Tribe submitted evidence that only a portion of the parcel had been irrigated-Application 48468 (Fritz), parcel 3. The Engineer found that from 1953 through 1972, the Tribe did not provide clear and convincing evidence as to non-use on any particular portion of the parcel. However, the Engineer also found that from 1973 through 1984, no water was placed to beneficial use on this parcel. Therefore, the government has also objected to the Engineer's determinations on this parcel, based on the latter part of the ruling. This objection is discussed below.

develop a full and complete record," and that the Engineer should have asked the Tribe or its witnesses to provide information regarding the exact location of the nonuse of the water. However, the burden was on the Tribe, not the Engineer, to present proof of nonuse.

The Engineer's conclusion that there is no clear and convincing evidence of nonuse on any specific portion of the disputed transferor parcels is supported by substantial evidence. Accordingly, the Engineer's findings as to Applications 48672 (Lohse), parcel 1; 48673 (Payne), parcel 1; 48825 (Emery), parcel 1; and 48865 (Rambling River), parcels 1-5 are affirmed.

[10] The Tribe also objects to the Engineer's factual findings on Application 48667 (Edson), parcel 1. With respect to forfeiture on that parcel, the Tribe's expert witness testified that the land was "bare land, trees" in 1962 and 1972, "bare land" in 1973 through 1975 and 1977, and "farm yard, structures" in 1980 and 1984. At the 1985 hearing, the applicant described the land use as housing. The Engineer gave greater weight to the applicant's description. The Engineer concluded, however, that the Tribe did not prove forfeiture or abandonment.

The Tribe is correct in its contention that whether the Engineer accepted the Tribe's or the applicant's land use description, there was no evidence of use of the water right to counter the Tribe's evidence of nonuse; that is, land that is occupied by housing cannot be irrigated. Based on this evidence, the Engineer erred in concluding that the Tribe failed to prove nonuse for the statutory period.

II. Perfection

In *Alpine III,* the court remanded for a determination of whether the water rights appurtenant to the transferor properties have been perfected. *Alpine III,* 983 F.2d at 1495.

[11] The law of Nevada, in common with most other Western States, requires that for the perfection of a water right for agricultural purposes, the water must be beneficially used by actual application on the

land, and the only transferable water right is one that has been appropriated to a beneficial use. *Nevada v. US,* 463 U.S. 110 at 126, 103 S. Ct. 2906, 77 L. Ed. 2d 509; *Alpine II,* 878 F.2d at 1226.[7]

[12-14] "To constitute a valid appropriation of water, there must be an actual diversion of it, with intent to apply to beneficial use, followed by an application to such use within a reasonable time." *In re Manse Spring,* 60 Nev.280, 286, 108 P.2d 311 (1940); NRS § 533.035; NRS § 533.070. "The nature of a water right is such that it takes time to perfect the right; when any work is necessary to complete the appropriation, the law gives a claimant a reasonable time to do it, and the appropriation is not deemed complete until the actual diversion or use of water." *Alpine I,* 503 F. Supp. at 885. In cases where beneficial use may be made of the water without diverting it, beneficial use alone is sufficient to constitute appropriation. *Nevada v. Morros,* 104 Nev. 709, 714, 766 P.2d 263 (1988).

The Tribe protested twenty-seven (27) parcels on the grounds of lack of perfection. The Engineer concluded that all but three parcels had been perfected on one or more of the following grounds: (1) a water right obtained pursuant to a contract dated prior to 1927 was perfected as a matter of law (General Conclusion of Law II) (20 parcels); (2) a water right was a pre-statutory vested right (General Finding of Fact XI) (7 parcels); and (3) the Tribe failed to provide sufficient evidence to prove lack of perfection (all parcels except 5, 11 & 12 of Application 47840).

---

[7]In *Alpine III,* the court rejected the Engineer's argument that, under Nevada law, a water right need not be perfected prior to being transferred. *Alpine III,* 983 F.2d at 1492. In General Conclusion of Law III, the Engineer determined that the court had misinterpreted Nevada law. The Engineer based his conclusion on NRS § 533.324, which became effective subsequent to the decision in *Alpine III.* Because the appellants have not directly appealed this ruling and it has no direct bearing on the fourteen applications, the court will defer consideration of this issue until it bears on the issue raised by the facts of a transfer application.

Neither the Tribe nor the government contends that the Engineer erred in his factual determinations regarding lack of perfection. The United States objects only to General Conclusion of Law II, wherein the Engineer found "that the evidence supports the conclusion that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected." (Ruling at 41).

During the administrative hearings conducted in 1985 and 1997, the Engineer received documentary and testimonial evidence that the Bureau of Reclamation's practice while operating the Project from 1902 through 1926 was to require water right applicants to develop their land and put it into production, prior to the Bureau determining irrigability and awarding a water right contract. Based on this evidence, the Engineer concluded that water rights under contracts issued prior to 1926 were necessarily perfected by beneficial application for irrigation prior to the time the contract was issued.[8]

The United States contends that the Engineer's conclusion is not supported by substantial evidence. However, this conclusion does not affect the Engineer's factual finding that the Tribe failed to prove by clear and convincing evidence lack of perfection on twenty-four (24) of the transferor parcels (which the government does not protest). Accordingly, the court will reserve ruling on this issue until such time as it has a direct bearing on the Engineer's findings relative to perfection on specific transfer applications.

III. Forfeiture

On the issue of forfeiture, the court in *Alpine III* remanded the case for a determination of whether the specific water rights sought to be transferred have been forfeited, if the specific water rights vested or were initiated after March 22, 1913. *Alpine III,* 983 F.2d at 1495.

---

[8]There was no evidence that TCID followed the policy after it took over the operation in 1927.

[15, 16] Under Nevada law, "the only requirement to prove forfeiture of water rights is to show a failure to use the water beneficially for five successive years." *Alpine III,* 983 F.2d at 1494; NRS § 533.060(2). Forfeiture thus differs from common law abandonment because an intent to relinquish a right is not a requirement. *In re Manse Spring,* 60 Nev. at 287. Because the law disfavors forfeiture, the protestant "bears the burden of proving, by clear and convincing evidence, a statutory period of nonuse." *Town of Eureka v. Officer of the State Engineer,* 108 Nev. 163, 169, 826 P.2d 948 (1992).

However, not all water rights are subject to forfeiture under Nevada law. NRS § 533.085, provides, in pertinent part:

> Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Accordingly, in order to determine whether a right may have been forfeited, the Engineer must first determine whether and when the right vested and under which law appropriation was initiated. *Alpine III,* 983 F.2d at 1495. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS § 533.060.

The Tribe protested 40 out of the 56 parcels on the grounds of forfeiture. The Engineer determined that none of transferors had forfeited their water rights on one or more of the following grounds: (1) all water rights in the Project were initiated in 1902 and, therefore, not subject to the forfeiture provisions of NRS § 533.060 (General Conclusion of Law IV)

(all parcels); (2) the contract is dated prior to March 22, 1913 and, therefore, not subject to Nevada's forfeiture provisions (22 parcels); (3) the right was a pre-project vested right, which is not subject to Nevada's forfeiture provisions (11 parcels); and (4) no clear and convincing evidence of nonuse for the statutory period (14 parcels).

The Tribe and the United States appeal only the Engineer's General Conclusion of Law IV. The Engineer relied solely on this conclusion to find lack of forfeiture for the following eight (8) parcels: Applications 47840(Mills), parcels 1 & 13; 48468 (Fritz), parcels 1-3 & 6; 48668 (Gaylord), parcel 1; and 48647 (Whitehead), parcel 1.[9]

In General Conclusion of Law IV, the Engineer stated that "all water rights requested for transfer pursuant to these transfer applications are changes of the 1902 water right decreed to the United States and all rights emanating therefrom were initiated in accordance with the law in effect prior to March 22, 1913. Therefore, the State Engineer finds the water rights are not
subject to the forfeiture provisions of Nevada Revised Statute § 533.060." (Ruling at 49). The Engineer made no determinations as to when each individual landowner took the first step to appropriate the water appurtenant to his land.

The Engineer contends that when a right was initiated (its priority date), depends upon when the "first step" to appropriate the water was taken and is a matter of Nevada law. The Orr Ditch Decree held that the water for the Project has a priority date of July 2, 1902. The Engineer thus

---

[9]The government contends the Engineer also relied solely on General Conclusion of Law IV for Application 48467 (Gerdamann), parcel 1. In addition to relying on this conclusion, however, the Engineer determined that this water right was a pre-Project vested water right not subject to the forfeiture provisions. The government does not appeal that finding. Accordingly, this water right is not subject to forfeiture.

concluded that regardless of whether the water belongs to the farmers or to the United States, the first step taken to appropriate the water was on July 2, 1902. "Therefore, by that definition alone the water right for all Project users was initiated in accordance with the law in effect prior to March 22, 1913." (Ruling at 47).

The Engineer further concludes that while *Alpine III's* distinction between the water right obtained by the United States for the Project and the water rights appurtenant to particular tracts of land proved important as to when the water rights vested, "this distinction has no importance as to the priority date of water rights in the Truckee Division of the Newlands Project because of the relation back doctrine." (Ruling at 47). The Engineer concluded that the United States appropriated and was decreed a 1902 water right for use on the entire Project and every single water right on the Project at issue was obtained pursuant to a contract with either the Bureau of Reclamation or TCID and uses the United States' 1902 decreed appropriation. Therefore, all of the Project farmers share proportionally in shortages during any water shortage year.

The interpretation of the term "initiated" is not in dispute. Clearly, NRS § 533.085 was intended to cover situations where steps had been taken to establish a water right in accordance with the law in effect prior to 1913, but the right had not yet been perfected. Once perfected, the right relates back to the first step taken to secure that right.

On the issue of forfeiture, the court in *Alpine III* only rejected the Engineer's argument that the water rights in the Project vested in 1902, when the United States obtained the water rights for the Project. In *Alpine III,* however, the court drew a distinction between the rights obtained by the United States and the rights appurtenant to particular tracts of land. That analysis is relevant to the interpretation of NRS § 533.085. In *Alpine III,* the court stated:

> The district court erred by assuming that all the water rights in question vested when the United States obtained water rights for

the Project in 1902. This amalgamation of water rights, obtained by the United States for the entire Project, is *not the relevant set of rights*. Instead, the rights at issue are the rights appurtenant to particular tracts of land that are the subject of the twenty-five contested transfer applications.

. . . .

The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in Manse Spring that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source." *Id.* at 1496. (emphasis added)

In making this distinction, the court looked to the purpose of the forfeiture statute. The Nevada Legislature included the provision exempting pre-1913 rights from impairment " to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act." *In re Manse Spring,* 60 Nev. at 288. The *Alpine III* court concluded that "with the purpose of the statute in mind, it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land." 983 F.2d at 1495.

Under the constraints of *Alpine III* (which this court is bound to apply), the Engineer's conclusion that all of the individual landowners' rights were initiated in 1902 is erroneous. Accordingly, the Engineer should have made a determination as to when the individual landowner took the "first steps" to appropriate the water appurtenant to his land, and not rely on the 1902 priority date. The failure to do so was an abuse of

discretion. *Western Systems, Inc. v. Ulloa,* 958 F.2d 864, 866 (9th Cir. 1992).

The following applications should be remanded to the State Engineer to make a determination as to when the transferor or his predecessor took the "first step, " independent of the 1902 priority date, to appropriate the water appurtenant to his land: 47840(Mills), parcels 1 & 13; 48468 (Fritz), parcels 1-3 & 6; 48668 (Gaylord), parcel 1; and 48647 (Whitehead), parcel 1. If there is any evidence that the individual landowner took any step to appropriate the water in accordance with the law in effect prior to March 22, 1913, the court will apply the relation back doctrine and the water right will not be subject to forfeiture. If, however, the appropriation of the right was initiated subsequent to that date, the water right will be deemed forfeited. In the absence of any evidence of individual steps taken prior to March 22, 1913 to appropriate the water, the Engineer must use the date of the contract as the date the water right was initiated.

While this court is bound by the holdings in Alpine III, the court would observe that it agrees with the Engineer that there is only one set of rights on the Project. Every water right which derives from the Project was initiated by the actions of the United States beginning in 1902, when it posted notice that it was acquiring the water rights within the Lahontan Valley. As part of the initial act of appropriating the water, the United States agreed that it would enter into contracts with landowners, whereby the individuals could obtain water rights from the Project, provided that the water was put to a beneficial use. The appropriation initiated was completed when the stored water was put to beneficial use on lands owned by the Project farmers. As to Project water, therefore, the court believes that under the relation back doctrine, the 1902 priority date should be controlling on the issue of forfeiture. While the court must apply the law as set forth in *Alpine III,* the court respectfully urges that the court of appeals revisit this issue.

IV. Abandonment

The court in *Alpine III* also remanded for a determination of whether the holder of the water rights sought to be transferred abandoned the water rights appurtenant to transferor properties. *Alpine III,* 983 F.2d at 1495.

[18-21] Under Nevada common law, abandonment of a water right "is the relinquishment of the right by the owner with the intention to forsake and desert it." *In re Manse Spring,* 60 Nev. at 287. "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances." *Revert v. Ray,* 95 Nev. 782, 786, 603 P.2d 262 (1979). Intent to abandon a water right may be inferred from the acts of the water right holder. *Id.* The owner's nonuse of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. *Alpine III,* 983 F.2d at 1494 and n.8; *Matter of Franktown Creek,* 77 Nev. 348, 364 P.2d 1069 (1961). The Tribe bears the burden of proving clear and convincing acts of abandonment and intent to abandon. *Town of Eureka,* 108 Nev. at 169.

The Tribe protested 55 out of the 56 parcels on grounds of abandonment. For 38 parcels, the Engineer found substantial periods of non beneficial-use of the water, ranging from 5 to 36 years.[10] Further, the Engineer's findings with regard to land use on a majority of these thirty-eight parcels demonstrate that, during the periods in which no water was applied to beneficial use, the parcel itself had been converted to a land use which was incompatible with irrigation, such as highways and roads, residential housing, and canals and drains. Neither the appellants nor the appellees contested these

---

[10]The 38 parcels are: Applications 47840 (Mills), parcels 1-20; 48468 (Fritz), parcels 1-6; 48668 (Gaylord), parcel 1; 48647 (Whitehead), parcel 1-2; 48672 (Lohse), parcel 2; 48666 (Craig), parcel 1-4; 48667 (Edson), parcel 7; 48467 (Gerdamann), parcel 1-2; and 48423 (Hoeksema), parcel 1.

factual findings.

Despite these findings, the Engineer found that none of the transferors had abandoned his water rights on the fifty-five (55) parcels based on one or more of the following grounds: (1) no clear and convincing evidence of non-use for a lengthy period of time (i.e. more than 5 years) (17 parcels); (2) a water right holder could not have the intent to abandon something the individual did not know he owned until 1983, when the Supreme Court decided *Nevada v. U.S.* (General Finding of Fact IX) (all parcels); and (3) the transferor continued to pay the assessments and taxes due on the water rights and none were delinquent (all parcels).

On appeal, the Tribe and the United States contend that: (1) the Engineer may not take payment of assessments and taxes into consideration in determining intent to abandon; (2) the Engineer's General Finding of Fact IX is not supported by substantial evidence; and (3) the Engineer's uncontroverted findings of substantial period of nonuse of water, combined with a land use which is inconsistent with irrigation, is sufficient to find abandonment. The Tribe also contends that the Engineer erred when he declined to apply a rebuttable presumption of intent to abandon.

A. Rebuttable Presumption

[22] The Tribe contends that where there is a prolonged period of non-use, but no permanent improvement, the rebuttable presumption of intent to abandon applies, and the applicant should be required to come forward with evidence to explain and justify the non-use. The Tribe relies on authority from other western states to support its argument.

In Interim Ruling 4411, the Engineer rejected this argument and concluded that he "will not shift the burden to the transfer applicant to present evidence justifying the nonuse upon a mere showing by the [Tribe] of a substantial period of nonuse of a water right." The Engineer ruled that a "rebuttable presumption of abandonment is not Nevada law."

The court concludes the Engineer did not err in holding that a

rebuttable presumption does not apply under Nevada law. *Alpine III,* 983 F.2d at 1493, n.8. The Nevada Supreme Court has clearly stated that the owner's nonuse of a water right is only some evidence of an intent to abandon the right. *Franktown Creek Irrigation Co. v. Marlette Lake Co.,* 77 Nev. 348, 354, 364 P.2d 1069 (1961).

B. Payment of Assessments and Taxes

[23] The Engineer further found that for all of the applications at issue, the owners of the water rights had continually paid the assessments and taxes due and that none were delinquent. The Engineer combined this finding, with General Finding of Fact IX, to conclude that all of the water right owners lacked the intent to abandon their water rights.

The Tribe and the United States contend that the Engineer's reliance on the payments of assessments and taxes to show lack of intent to abandon is contrary to law and unsupported by the evidence. The appellants first argue that allowing the payment of the fees to preserve a water right in the face of nonuse is inconsistent with the usufructuary nature of water rights. The appellants further contend that the testimony does not support the Engineer's conclusions because all water right owners within the Project are assessed for each and every water-righted acre and payment is mandatory. The assessments are made without taking into consideration whether the landowner irrigates the land. If the taxes are delinquent, water is not delivered until the assessments are paid. Therefore, the appellants contend that the payment of assessments does not imply anything about the owner's intent to retain a right to irrigate all of his land.

However, abandonment is a question of fact to be "determined from all the surrounding circumstances." *Revert,* 95 Nev. at 786. Accordingly, the payment of assessments and taxes is a circumstance which the Engineer should take into consideration in determining intent.

C. General Finding of Fact IX

Next, the appellants contend that the Engineer's General Finding

of Fact IX is not supported by substantial evidence. In that finding, the Engineer concluded that for the purpose of determining abandonment of water rights, a person could not have had the intent to abandon a water right which that person did not know he owned until the Supreme Court's decision in *Nevada v. U.S.*, 463 U.S. 110, 77 L. Ed. 2d 509, 103 S. Ct. 2906 (1983). The Engineer's conclusion is based on his finding that: (1) the Orr Ditch Decree only mentions a water right belonging to the United States; (2) the Special Master in the Orr Ditch litigation treated the United States' water right as if it were a type of implied federal reserved water right not subject to the rules of due diligence or the doctrines of forfeiture and abandonment; (3) the Alpine Decree confirms the right of the United States to divert and store the Carson River for distribution to the individual farmers; and (4) the issue of ownership in the Project was not completely resolved until the lower court's decision in *Alpine I*, 503 F. Supp. 877 and, the resulting appeal and decision in *Nevada v. US*, 463 U.S. 110, 77 L. Ed. 2d 509, 103 S. Ct. 2906 in 1983.

The court concludes that this finding is not supported by substantial evidence because it misconstrues the type of knowledge required, there is no factual support in the record for the conclusion and it is based on an erroneous legal premise.

[25, 26] Abandonment is the voluntary relinquishment of a known right. *In Re Manse Spring*, 60 Nev. at 285. It is well-settled that "the concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states. In fact, the principle of beneficial use is so well entrenched in our legal lexicon that the Nevada Legislature declared almost a century ago that 'beneficial use shall be the basis, the measure and the limit of the right to the use of water.'" *Desert Irrigation Ltd. v. State of Nevada*, 117 Nev. 1049, 1056 (1997); NRS § 533.035. "When we speak of the owner of a 'water right' we use the term in its accepted sense; that is to say that the owner of a water right does not acquire a property in the water

as such, at least while flowing naturally, but a right gained to use water beneficially which will be regarded and protected as real property." *Application of Filippini,* 66 Nev. 17, 22, 202 P.2d 535 (1949). "Under the established tenet that a beneficial use is the measure and limit of a water right, when the necessity for the use of the water ceases to exist or is reduced, the extent of the water right is limited to the extent of the beneficial purpose which remains." *US v. Alpine Land,* 919 F. Supp. 1470, 1476 (D.Nev. 1996); NRS § 533.045. Thus, the nature of the water right is usufructuary. *W.A. Hutchins, 1 Water Rights Laws in the Nineteen Western States 440* (1974).

Accordingly, the type of knowledge required is not one of legal ownership, but of a right to the use of the water. There is an absence of evidence in the record to indicate that the Project farmers did not know that the contract gave them the right to use the water beneficially on their own land.

Nor can that inference be drawn from the fact that, immediately subsequent to the decision in *Nevada v. US,* the Project irrigators made applications to the Engineer to bring the records in compliance by correcting the places of use of their water rights to include actually irrigated acreage. At least two of the applicants allege that they were contacted by TCID to make the change applications. Indeed, it is alleged that TCID threatened to stop the flow of water until the applications were filed. No applicant testified or alleged that once he was aware of the Supreme Court's decision, he immediately filed a transfer application with the Engineer. Thus, there is no factual evidence to support the Engineer's conclusion that none of the applicants could legally abandon their rights prior to the *Nevada v. US* decision in 1983.

Further, as was stated in *Pyramid Lake Tribe v. Hodel,* the Engineer's argument that *Nevada v. US* "changed the rules" is a "dubious proposition." 878 F.2d 1215, 1217, n.2 (9th Cir. 1989). Both the court in *Alpine I* and the Supreme Court in *Nevada v. US* relied on holdings of

Ickes v. Fox, 300 U.S. 82, 81 L. Ed. 525, 57 S. Ct. 412 (1937) and *Nebraska v. Wyoming,* 325 U.S. 589, 89 L.Ed. 1815, 65 S. Ct. 1332 (1945). In *Ickes,* the Supreme Court stated that "although the government diverted, stored and distributed the water, the ownership of the water or water rights did not vest in the United States. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners." 325 U.S. at 597. Thus, any property right of the government in the irrigation works is separate and distinct from the property right of the landowners in the water right itself. *Id.* Therefore, neither *Alpine I* nor *Nevada v. US* changed the law in this regard. *Pyramid Lake,* 878 F.2d at 1217, n.2.

Accordingly, the Engineer's General Finding of Fact IX is not supported by substantial evidence. It was error for the State Engineer to rely on this general conclusion to support a general and specific finding that all of the appellees lacked the intent to abandon their water rights.

D. Evidence of Nonuse of Water and Improvements

The appellants contend that where the Engineer's uncontroverted findings of fact include a prolonged period of nonuse of water on a parcel and an improvement that precludes irrigation, the water right was abandoned and, therefore, may not be transferred. While the court generally agrees with this proposition, these findings must be considered in the context of this federal reclamation project.

The Project has always been controlled by the federal government or its agent, TCID. The evidence indicates that TCID was aware, and the government should have been aware, that for a number of years the farmers who had the right to irrigate their land pursuant to a water right contract were not always irrigating the particular land described in the contract. This fact was mostly due to the natural evolution and development of the farms over the century.

[28] Traditional equitable principles govern whether the strict requirements of Nevada water law are to be relaxed. *Bailey v. State,* 95

Nev. 378, 383, 594 P.2d 734 (1979); *Alpine II,* 878 F.2d at 1229 (Judge Noonan, concurring). The court finds that intrafarm transfers within the Newlands Reclamation Project should be upheld as a matter of equity.[11]

There are several factors which support this conclusion. First, there is evidence in the record that the procedures to transfer water changed at least three times over the years. At one point, an applicant was told that transfers were not allowed. Further, when the farmers were finally told by TCID that they were required to file a transfer application, they complied. More importantly, the individual who was legally entitled to use the water continued to beneficially apply the water to his land, albeit in a different location than what might have been described in the contract, to the extent the location was described in the contract.[12] Finally, there is no evidence that any of the landowners making intrafarm transfers used more water than the amount granted by contract with the government. Accordingly, the Engineer did not err in concluding that the water rights subject to intrafarm transfers will not be deemed to have been forfeited or abandoned.

[29] However, a transfer of a water right for value, from one property owner to another, who does not have any contractual right to Project water, does not warrant the same equitable considerations. As to these transfer applications, the legal principles of forfeiture and abandonment must apply.

In this conjunction, the Engineer erred in finding that payment of taxes, alone, was sufficient to establish the landowners lack of intent to abandon. Where there is evidence of both a substantial period of nonuse,

---

[11]The United States does not protest the intrafarm transfers.

[12]The contracts often did not describe the exact location of the water
rights within any particular tract of land.

combined with evidence of an improvement which is inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. If, however, there is only evidence of nonuse, combined with the finding of a payment of taxes or assessments, the court concludes that the Tribe has failed to provide clear and convincing evidence of abandonment.

V. CONCLUSION

Accordingly, based on the foregoing findings and conclusions:

1) The Engineer's disallowance of transfer application 47840 (Mills), parcel 5, is affirmed.

2) Application 47840 (Mills), parcels 11 and 12, are remanded to the State Engineer for findings on the issue of perfection, based on the provision of a water right contract by either the applicant or TCID.

3) Application 48667 (Edson), parcel 1, is hereby remanded to the State Engineer for further findings on the issue of forfeiture and abandonment in accordance with this order.

4) The Engineer's findings as to Applications 47840 (Mills), parcel 21; 48828 (Inglis), parcel 1; 48672 (Lohse), parcel 1; 48673 (Payne), parcel 1; 48424 (Dalton), parcel 1; 48667 (Edson), parcels 2 & 5; 48825 (Emery), parcel 1; 48423 (Hoeksema), parcels 2 & 3; and 48865 (Rambling River), parcels 1-7 are affirmed.

5) All future transfer applications which concern an intrafarm transfer of a water right will not be subject to principles of forfeiture or abandonment.[13]

---

[13]In support of his finding of non-forfeiture, the Engineer listed the fact that a transfer was within the same farm unit solely for Application 48865 (Rambling River), which was upheld on other grounds in this order. On remand, however, if there is evidence that any of the other thirteen applications are solely intrafarm transfers, the Engineer shall certify that finding to the court and the doctrines of forfeiture and abandonment will not apply.

6) The following applications are remanded to the State Engineer on the issue of forfeiture to make a determination as to when the transferor or his predecessor took the "first step," independent of the 1902 priority date, to appropriate the water appurtenant to his land: 47840(Mills), parcels 1 & 13; 48468 (Fritz), parcels 1-3 & 6; 48668 (Gaylord), parcel 1; and 48647 (Whitehead), parcel 1. If there is any evidence that the individual landowner took any step to appropriate the water in accordance with the law in effect prior to March 22, 1913, the Engineer should apply the relation back doctrine and the water right will not be subject to forfeiture. If, however, the appropriation of the right was initiated subsequent to that date, the water right will be deemed forfeited. In the absence of any evidence of individual steps taken prior to March 22, 1913 to appropriate the water, the Engineer must use the date of the contract as the date the water right was initiated.

The Engineer is further ordered to make this determination for all pending transfer applications where: (1) the transfer of the water right was not an intrafarm transfer; (2) the water right is not a pre-project vested right; (3) the contract is not dated prior to March 22, 1913; or (4) there is clear and convincing evidence of nonuse for the statutory period.

7) The following applications are hereby remanded to the Engineer to take additional evidence which will bear on the transferor's intent to abandon: Applications 47840 (Mills), parcels 1-4, 6-10 and 13-20; 48468 (Fritz), parcels 1-6; 48668 (Gaylord), parcel 1; 48647 (Whitehead), parcel 1-2; 48672 (Lohse), parcel 2; 48666 (Craig), parcel 1-4; 48667 (Edson), parcel 7; 48467 (Gerdamann), parcel 1-2; and 48423 (Hoeksema), parcel 1. As previously indicated, additional evidence on the transferor's intent need only be offered by the applicant if there is both a finding of a substantial period of nonuse, combined with a finding of a land use inconsistent with irrigation. It is unclear from the record which of these thirty-eight parcels meets the criteria. If there is solely a finding of nonuse on any of these parcels, additional evidence need not be taken and the Engineer's findings

of non-abandonment will be affirmed.

The type of evidence provided may include, but is not limited to, the fact that the transferor or his predecessor was told by the United States or TCID or any of its agents that he could not file a transfer application or that he could make an informal transfer with their approval. However, the evidence may not consist solely of the transferor's testimony that he did not have the requisite intent to abandon. Should the transferor fail to present additional evidence on the issue of intent, then the Tribe has met its burden of demonstrating by clear and convincing evidence abandonment of the water right appurtenant to the land.

The Engineer shall certify his findings to the court.

As to the transfers approved by this order, the United States shall not prohibit delivery of water to those transferee parcels.

No. 99-16817

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JULY 5, 2001

CHIEF JUDGE MARY M. SHROEDER

JUSTICE JOHN KEY NOONAN

JUSTICE WILLIAM A. FLETCHER

UNITED STATES OF AMERICA,

Plaintiff - Appellant

v.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner

v.

ORR WATER DITCH COMPANY, et al.,

Defendants

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,

Defendants - Appellees

On Appeal From the United States District Court

For the District of Nevada

Lloyd D. George, District Judge, Presiding

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Michael J. Van Zandt

Craig A. Pridgen

McQuaid Metzler Bedford & Van Zandt, LLP

221 Main Street, 16th Floor

San Francisco CA 94105

(415) 905-0200
Attorneys For Appellee Truckee-Carson Irrigation District

I. INTRODUCTION AND STATEMENT OF COUNSEL

Defendants-Appellees Truckee Carson Irrigation District (TCID) seeks rehearing *en banc* on the July 5, 2001 panel decision (Schroeder, Mary M., Chief Judge, Noonan, John Key, and Fletcher, William A.) in the case of *United States v. Orr Ditch Co.* , 99-16817, concerning issues of national significance with respect to all of the arid western United States, the applicable provisions of western water law as promulgated by the Reclamation Act of 1902 and subsequent state legislation in Nevada. The ruling by the majority of the panel conflicts with prior rulings of the United States Supreme Court and the Supreme Court of the State of Nevada relative to the initiation of the appropriation of water rights, the application of statutory forfeiture or abandonment to those rights, and ignores the "Relation-Back" doctrine of priority to the date of initial appropriation. *See Ophir Mining Co. v. Carpenter*, 4 Nev. 534, 543-544.

The panel recognized that the forfeiture provision does not apply where the appropriation of the water right had been initiated in accordance with the laws prior to March 22, 1913. Nevada Revised Statute ("N.R.S.") § 533.085; *United States v. Orr Ditch, supra* at 8494-8495.

The panel, however, relying on the case of *United States v. Alpine Land & Reservoir Co.*, 983 Fed.2d 1487 (9th Cir. 1993) ("Alpine III") has found that for a water right to receive the protection of N.R.S. § 533.085, that water right must have vested, or an "individual landowner" must have "initiated" appropriation of that right, before March 22, 1913. *United States v. Orr Ditch, supra*, 8497. As noted by Justice Noonan, the Alpine III decision "was about vesting" whereas this case is about the "initiation" of appropriation. The Alpine III decision involves the waters of the Carson River. The water rights involved in the within action are a portion of "claim no. 3" of the general adjudication entitled *United States v. Orr Ditch Co.*, equity no. A-3 (D.Nevada 1944) ("Orr Ditch Decree") relating

to the Truckee River and is separate and distinct from the "Alpine cases."

TCID seeks *en banc* review with respect to the panel's interpretation and application of the concept of the "initiation by appropriation of the water right" as it relates specifically to the March 22, 1913 forfeiture statute, N.R.S. § 533.060. *En banc* review is appropriate because the majority ruling conflicts with Supreme Court precedent *Carter v. Derwinski* 998 F.2d 611, 613-614 (9th Cir. 1993) and Nevada Supreme Court rulings on state law – *Nevada Highway Patrol v. Nevada* 966 F.2d 534 (9th Cir. 1992). The overwhelming weight of authority recognizes that the first act of appropriation of the water of the Truckee River under the Reclamation Act of 1902 was iniitated by the United States on July 2, 1902 as trustee on behalf of all subsequent landowners within the Reclamation Project. *See Nevada v. United States*, 463 U.S. 110, 126 (1983).

A rehearing *en banc* is required because the panel's opinion overlooks the express provisions of the Reclamation Act of 1902, and the Orr Ditch Decree, conflicts with or is fully distinguishable from decisions of this Court in the "Alpine" cases, ignores established statutory law in the State of Nevada, conflicts with decisions of the Supreme Courts of the United States and Nevada on issues of exceptional importance and is necessary to maintain uniformity of the Court's decisions. The panel's opinion, if allowed to stand, will effectively rewrite Nevada and western water law, and effectively undermine the laws of initiation and appropriation of the water rights pursuant to the Reclamation Act of 1902. *See: Wells A. Hutchins, Water Report Laws in the Nineteen Western States*, Vol. 1, 383, 395 (1971). As the Supreme Court held in *Nevada v. United States*, *supra* at 123, this panel's ruling "would do away with almost a century of decided case law relating to the Reclamation Act of 1902 and the water rights in the public domain of the west" which was appropriated by the United States for the beneficial use and application of the settlers. The panel's decision, if allowed to stand, will impair, if not

destroy, the integrity of Congress' scheme and intent in its adoption of the Reclamation Act as interpreted by a multitude of United States and Nevada Supreme Court decisions.

The majority of the panel, while recognizing the concept of an "initiation of appropriation" from the source, ignores the practical reality that the United States was the only entity which in fact initiated the appropriation of the water from the Truckee River as specifically set forth in the Orr Ditch Decree. The ranchers and the farmers within the Newlands Project obtained water from the canals of the Truckee Division of the Reclamation Project, not from the Truckee River. They acquired the water directly by way of water right contracts, for consideration, entered into with the United States whereby it or its successor, TCID, agreed to deliver water through the delivery system which exists because of the first initiation and diversion of water from the Truckee River at Derby Dam in 1902. The Supreme Court in *Nevada v. U.S., supra,* has clearly established that the United States did not acquire an ownership interest in the water but rather initiated the appropriation as trustee for the benefit of the ultimate landowners. Further, it is physically impossible for any settler to initiate an appropriation of water from the Truckee River for application on farms located several miles to the east of the river.

The panel failed to recognize certain state statutory provisions which provide that once the water has been placed to a beneficial use, the individual farmer or rancher acquires a priority date which "relates back" to the "time when the first step was taken to secure (such right)." *Ophir Mining Co. v. Carpenter, supra* at 544. This decision constitutes the foundation of Nevada's water law.

Finally, the majority of the panel has relied upon the concept of an "investment-backed expectation" as being a requirement that an individual water right holder must establish in order to benefit from the exemption provisions of N.R.S. § 533.085. The majority of the panel equates the initiation of an appropriation of a water right with the concept that the

current water right holder or his predecessor must have had an "investment-backed expectation" as of the effective date of the statute in order to be exempt from forfeiture under NRS § 533.060. *United States v. Orr Ditch, supra,* 8496. The panel majority is attempting to introduce a legal concept which universally has been held by the courts to be only applicable to situations involving a regulatory taking and the right to compensation therefor. There is no authority that the purpose of the antiforfeiture statute was to exempt "investment-backed expectations." *U.S. v. Orr Ditch, supra*, 8508.

II. PETITION FOR REHEARING *EN BANC*

A. The Panel's Opinion Is Not Supported by the Express Terms of the Reclamation Act of 1902 Nor the Orr Ditch Decree

The United States, acting under the Reclamation Act of 1902, is the known initiating appropriator and predecessor in interest to the irrigators within the Newlands Project. The initiation of the appropriation and actual diversion of the water from the Truckee River was not done for the benefit of the United States; but, rather, for the benefit of the ultimate users. To find, as the majority has, that the initial act of appropriation by the United States would only benefit those who settled within the Newlands Project prior to March 22, 1913 contradicts the very essence and purpose of the Reclamation Act and is inconsistent with the provisions of the Orr Ditch Decree. In view of the application of the "relation back doctrine" recognized in Nevada since the Nevada Supreme Court ruling in *Ophir Mining Co. v. Carpenter*, *supra* at 544, the only logical interpretation of the Reclamation Act and the Orr Ditch Decree is that the United States did not acquire ownership of the water as a result of its appropriation for its own sake; but, for the benefit of the ultimate settlers within the Project who would, under State law, always have the benefit of the 1902 priority date.

In fact, § 8 of the Reclamation Act of 1902 provides in relevant part that "the right to the use of water acquired under the provisions of this

Act shall be appurtenant to the land irrigated, and beneficial use should be the basis, the measure and the limit of the right." 32 Stat. 390.

The first initiation of the appropriation of the water rights is synonymous with the initiation of the Project and was recognized in the Orr Ditch Decree, *supra,* in Claim No. 3:

> Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of Interior, on July 2, 1902 withdrew from public entry . . . the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River . . . and with the construction of the Truckee Canal . . . running from this dam a distance of 31 miles to Lahontan Reservoir . . . The lands so withdrawn for reclamation are naturally dry and arid and without the application of water, are of little or no value.

The United States initiated the first acts of appropriation from the Truckee River specifically for the agricultural development of the Newlands Project. The water was not beneficially used until subsequently conveyed and sold by the United States to the settlers who developed this arid region over the ensuing decades.

B. Although the Majority References *Nevada v. United States, supra,* Justice Noonan, in His Dissent, Notes that the Majority Silently but Effectively Departs from that Decision

The Court, in *Nevada v. United States, supra* at 123-126, has soundly rejected the reasoning of the majority in this case. There was only one act of initiation and that was by the United States in 1902 whereby it appropriated the water from the Truckee River and built the irrigation system not for its own use and benefit but for the exclusive use and benefit

of the irrigators who would follow. To the extent that the United States acquired an "ownership interest" in the waters of the Truckee River as of the date of the initiation of the appropriation by the United States, those rights were ultimately sold by way of agreement and transferred to the ultimate irrigators. Under Nevada state law, the act of appropriation is not sufficient to establish a valid water right. The water right must be put to a beneficial use within a reasonable period of time. The Supreme Court held in *Nevada v. U.S., supra* at 127, "the law of Nevada, in common with most other western states, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land. *Prosole v. Steamboat Canal Co.* 37 Nev. 154, 159-161, 140 Pacific 720-722 (1914). Such a right is "appurtenant to the land on which it is used." *Id.* at 160-161.

Nevada v. U.S., supra at 126, held as follows:

> "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an appropriation within a reasonable time of the water to a beneficial use. *See Murphy v. Kerr*, 296 Fed. 536, 542, 544, 545. *See Ickes v. Fox*, 300 U.S. 82, 94-95."

Quoting *Ickes v. Fox, supra*, pages 94-95 (57 Supreme Ct. p. 416), the Supreme Court in *Nevada v.U.S., supra* at 124, further clarified its ruling in that case by holding:

> 'Although the government diverted, stored and distributed the water, the intention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was

made not for the use of the government but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. . . .

In *Nebraska v. Wyoming*, 325 U.S. 589, 613-634, the court stated:

> 'The Secretary of the Interior pursuant to § 3 of the Reclamation Act withdrew from public entry certain public lands in Nebraska and Wyoming which were required for the North Platte Project and the Kendrick Project. Initiation of both projects was accompanied by filings made pursuant to § 8 in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the project.

The Supreme Court in *Nevada v. U.S., supra,* concludes by finding that like most of the western United States, it is the landowner/irrigator who is the owner of the water right and not the government which established the Reclamation Project. Once the irrigator acquires the contractual right to receive water, agrees to pay for the delivery and places that water to a beneficial use, that water right becomes perfected and acquires a priority date based upon the first initiation of appropriation by the United States under the Reclamation Act. The Court held in *Nevada v. U.S., supra* at 127, as follows:

> "In light of these cases, we conclude that the government is completely mistaken if it believes that the water rights

> confirmed to it by the Orr Ditch Decree in 1944 for use in irrigating lands within the Newlands Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the government might see fit. Once these lands were acquired by settlers in the Project, the government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of project water to the land. As in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of the relevant state and the contracts entered into by the landowners and the United States make this point very clear."

There is nothing in the finding of the Supreme Court in any of the cases cited above which would lead to the conclusion that there are multiple initiations of appropriation of the same water rights from the Truckee River at Derby Dam. The appropriation was initiated by the United States under the Reclamation Act of 1902, in July of 1902. The United States never put that water to a beneficial use. Under the laws of the State of Nevada, in order to acquire a valid water right for irrigation purposes, the water must be ultimately placed into beneficial use by application to the land to which it ultimately becomes appurtenant.[1] There has been no allegation or showing by the protestants in the within litigation that those who perfected the water right did not do so in a timely and reasonable fashion. Unlike the opinions stated by the majority of the

---

[1]Section 8 of the Reclamation Act provides: "That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State. . . " *Nevada v. U.S., supra* at 123.

panel, there is absolutely no authority which sustains the finding that each individual landowner must have taken affirmative steps to independently appropriate water from the river for his own use prior to March 22, 1913 in order to receive the protection from the forfeiture statute, § 533.060.

C. Neither N.R.S. 533.085 Nor Any Other Statute in Nevada Provides for Nor Requires Multiple "Initiation" of Appropriation of a Water Right

The majority of the panel opines that the "Alpine III" decision is applicable to the case at hand. The Alpine cases arise from the Alpine Decree and this litigation arises from the Orr Ditch Decree, *supra*. Furthermore, there is nothing contained in the Reclamation Act, the Orr Ditch Decree or any relevant Nevada statute which sustains the proposition that there would be "multiple initiations of appropriation" nor "multiple priority dates" for the same water originally diverted by the United States. As recognized in *Nevada v. U.S., supra* at 125, 126, the irrigators within the Project acquired their rights by contractual agreements with the United States and subsequently its agent, TCID, for water rights already appropriated. *Nevada v. U.S., supra* at 127, note 9, establishes that the contracts entered into between the Project owners and the United States, or TCID as successor acting pursuant to its agreement with the government, are similar to those addressed by the court in *Ickes v. Fox* and *Nebraska v. Wyoming, supra*.[2] The majority ruling herein cannot be reconciled with the contradictory authority of the Supreme Court, which has unequivocally held that the initial and only appropriation was by the United States in 1902. There is no rational or legal justification for a conclusion that one who made a water right application on March 21, 1922 should be treated differently from an individual who made application for a water right on March 23, 1922. Under Nevada law there

---

[2]The quoted contracts provide that in water shortage years the amount of available water shall be proportionately shared – thus memorializing a common priority.

are only pre-statutory and statutory water rights. Pre-statutory rights are established by prior appropriation. Statutory rights arise under state law codified in 1913. None of the Newlands settlers applied for statutory water rights with a pre-statutory priority of 1902. Any post-1913 appropriations would have required applications to be approved by the State Engineer but this has never been done because the State recognizes the prior appropriations.

D. The Law of the State of Nevada Is Clear That Once a Water Right Has Been Put to Beneficial Use, the Priority Date Relates Back to the Time When the First Step Was Taken to Secure Such Right.

The majority of this panel ignores or misinterprets the plain language of NRS § 533.085, the specific provision of the Orr Ditch Decree and *Nevada v. U.S., supra*, which clearly indicate the United States initiated the appropriation of the water not for its benefit but for the benefit of all settlers. § 533.085(1) provides that "[N]othing contained in this chapter shall impair the vested right of any person to use the water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where the *appropriations have been initiated in accordance with the law prior to March 22, 1913*" (emphasis added). *See: In Re Manse Spring*, 60 Nev. 280, 108 P.2d (1940). "Claim No. 3" of the Orr Ditch Decree provides in relevant part that:

> "[S]ubject to prior appropriations and vested rights permitted and confirmed by the act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority date of July 2, 1902, through the Truckee Canal 1.5 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of land on the Newlands Project. . . "

Once the land was prepared for irrigation purposes and the water

delivered, the individual farmer would then put the water to a beneficial use, thus perfecting that water right. Under the long established law of the State of Nevada, once the water is placed to a beneficial use, its priority date "relates back" to the date when the first step was taken to secure that right. *See Ophir Mining Co. v. Carpenter*, 4 Nev. 534, 544 (1868). There can be no doubt that the first step of initiation of the appropriation began through the acts of the United States in 1902. This is particularly true under circumstances where the diversion of the water from the Truckee River was not to the benefit of the United States but the settlers. The majority of the panel misunderstood the facts and circumstances surrounding the development of the Newlands Project. The individual settlers who came to the valley in the years subsequent to 1902 did not appropriate water but rather contracted for water already appropriated. The majority of this panel, which has ruled that the individual must take steps to appropriate the water which "means that the individual must have (at the very least) contracted with the federal government prior to that date (1913) for delivery of the Project water," is in err. Most of the land which is in the Newlands Project was not settled until after 1913. Further, if this reasoning is correct, there would be a multitude of priority dates established within the Newlands Project. If that were in fact the case, water deliveries authorized by Claim No. 3 of the Orr Ditch Decree could not be made economically through the irrigation system built by the United States. This is particularly true in water shortage years. One would find that a multitude of deliveries would have to be made based upon the various priority dates of each individual user. All users on a particular canal would have to receive the guaranteed annual allotment of water if they had an early priority date, whereas later settlers would be denied water deliveries until earlier preferences had been fulfilled. The system simply cannot accommodate such an arrangement without massive water loss and waste. Consistent with the Alpine III decision, the appropriation of the rights were initiated in accordance with the law in effect prior to March 22, 1913. *Supra*, 1496.

E. Investment-backed Expectations Are Not Applicable to Water Right Appropriation and Perfection Issues Governed by State Law And, Based upon Prior Decisions, Has Been Limited to Regulatory Taking Claims on the Right to Damages

The majority of this panel has injected a new and rather unique theory to support its rationale of its decision. The Court relies upon the fact that absent an "investment-backed expectation" by the settlers on or before March 13, 1913, the provisions of NRS § 533.085 may not relieve the water users from the application of the forfeiture statute. There are 36 cited cases as of this date in the Ninth Circuit which deal with the concept of investment-backed expectations. None of these cases have any relationship or application to water law issues nor particularly to the appropriation and beneficial use of water within Nevada with the sole exception of the opinion which is the subject matter of this Petition.

It is inconceivable that any settler who made an investment either evidenced by money or labor in acquiring property within the Newlands Project would do so without the expectation that he or she would obtain water rights from the United States as a result of the Reclamation Act and the Orr Ditch Decree. It is much more logical to assume that the investment-backed expectations of all of the settlers within the Newlands Project was that they would be able to contract for and receive delivery of water from the Newlands Project and be subject to all of the same priorities, rights and title as any other individual who preceded them. As amply pointed out by Justice Noonan in his dissent, "[A]s the anti-forfeiture statute protects both vested rights and the first tentative step to vesting, there is no reason to attribute to the statute a purpose to protect investments."

III. CONCLUSION

The majority's ruling in this case is inconsistent with and cannot be reconciled with Nevada Law, the Reclamation Act of 1902 nor the U.S. Supreme Court rulings. The Petition should be granted for a rehearing *en*

banc.

DATED: February 6, 2002

Respectfully submitted,

McQUAID, METZLER, BEDFORD

& VAN ZANDT, LLP

s/_____

Craig A. Pridgen

Attorneys For Appellee Truckee-Carson

Irrigation District

Supreme Court, U.S.
FILED
APR 26 2002
OFFICE OF THE CLERK

Nos. 01-1224 and 01-1226

In the Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

STATE OF NEVADA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

WILLIAM B. LAZARUS
KATHERINE J. BARTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

22 pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that, in determining whether water rights held by individual water users in the Newlands Reclamation Project in Nevada are exempted from forfeiture pursuant to Section 533.085 of Nevada Revised Statutes Annotated, the date on which the appropriation was initiated is the date on which the individual landowner took the first steps to appropriate project water appurtenant to his land.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Black v. *Cutter Labs.*, 351 U.S. 292 (1956)	17
Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985)	12
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	11
Huddleston v. *Dwyer*, 322 U.S. 232 (1944)	12
Leavitt v. *Jane L.*, 518 U.S. 137 (1996)	12
Lehman Bros. v. *Schein*, 416 U.S. 386 (1974)	16
Manse Spring, In re, 108 P.2d 311 (Nev. 1940)	7
Nevada v. *United States*, 463 U.S. 110 (1983)	4, 16
Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001)	17
Palmer v. *Hoffman*, 318 U.S. 109 (1943)	13
Propper v. *Clark*, 337 U.S. 472 (1949)	13
Pyramid Lake Paiute Tribe of Indians v. *Morton*, 354 F. Supp. 252 (D.D.C. 1973)	5
Steele v. *General Mills, Inc.*, 329 U.S. 433 (1947)	12
The Tungus v. *Skovgaard*, 358 U.S. 588 (1959)	13, 14
United States v. *Alpine Land & Reservoir Co.*:	
503 F. Supp. 877 (D. Nev. 1980), aff'd, 697 F.2d 851 (9th Cir.), cert. denied, 464 U.S. 863 (1983)	4, 5
878 F.2d 1217 (9th Cir. 1989)	6, 15
965 F.2d 731 (9th Cir. 1992), as amended, 983 F.2d 1487 (9th Cir. 1993)	6, 7, 14, 15, 16
279 F.3d 1189 (9th Cir. 2002)	10

Cases—Continued: Page

United States v. *Durham Lumber Co.*, 363 U.S. 522 (1960) 13, 14
United States v. *Orr Water Ditch Co.*, In Equity, Docket No. A3 (D. Nev. Sept. 4, 1944) 4
Virginia Military Institute v. *United States*, 508 U.S. 946 (1993) 11

Statutes and regulations:

Endangered Species Act, 16 U.S.C. 1531 *et seq.* 4
Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3289:
§ 202, 104 Stat. 3294 5
§ 209, 104 Stat. 3317 5
Act of June 9, 1999, ch. 515, 1999 Nev. Stat.:
§ 1, 1999 Nev. Stat. 2630 3
§ 3, 1999 Nev. Stat. 2631 3
§ 7, 1999 Nev. Stat. 2634 ..... 3, 13
§ 5(4)(e), 1999 Nev. Stat. 2633 13
Nev. Rev. Stat. Ann. (Michie 1995):
§ 533.060(2) 3
§ 533.060(3) 3
§ 533.085 ..... 8-9, 10, 15
§ 533.085(1) 3, 7, 14
§ 533.345 5
§ 533.370 5

Miscellaneous:

Robert Stern et al., *Supreme Court Practice* (7th ed. 1993) 11, 12
2 *Almanac of the Federal Judiciary* (2002) 16

In the Supreme Court of the United States

No. 01-1224

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 01-1226

STATE OF NEVADA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26)[1] is reported at 256 F.3d 935. The opinion of the district court (Pet. App. B1-B21) is not reported.

[1] The citations to "Pet. App." refer to the petition for a writ of certiorari filed by the State of Nevada, No. 01-1226.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2001. Petitions for rehearing were denied on November 8, 2001 (Pet. App. D2-D3). The petitions for a writ of certiorari were filed on February 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States and the Pyramid Lake Paiute Tribe challenged the Town of Fernley's application to the Nevada State Engineer for a change in the manner and place of use of approximately 280 acre-feet of water from the Newlands Reclamation Project. The district court rejected the United States' and the Tribes' contentions that the water rights had been forfeited or abandoned under Nevada law. Pet. App. B1-B21. The court of appeals reversed and remanded for further proceedings. *Id.* at A1-A26.

1. Nevada enacted its first comprehensive water code in 1913. That statute contained a provision for forfeiture of water rights, stating that any water right not used during a period of five successive years was forfeited:

> [I]f the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtentant thereto theretofore acquired * * *.

Nev. Rev. Stat. Ann. § 533.060(2) (Michie 1995). The statute also contained a savings clause, exempting certain water rights from forfeiture:

> Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Id. § 533.085(1). Those laws apply to the water rights at issue in this case.[2]

2. The Department of the Interior's Bureau of Reclamation administers the Newlands Reclamation Project, which diverts water from the Truckee and Carson Rivers in Nevada to provide water for irrigation. Pet. App. A6. Since 1926, except for a period of time during the 1970s and 1980s, the Truckee-Carson Irrigation District (TCID) has operated the Newlands Project through contractual arrangements with the Department of the Interior. Beneficial rights to the use of Project water are held by individual landowners pursuant to contracts with the Department of the Interior. *Ibid.*

---

[2] In 1999, the Nevada legislature amended Section 533.060(2) of the Nevada Revised Statutes Annotated to exempt all surface water rights in Nevada from statutory forfeiture. See Act of June 9, 1999, ch. 515, §§ 1, 3, 1999 Nevada Stat. 2630, 2631 (A.B. No. 380) (adding a new section to, and amending, Section 533.060(3)). Section 7 (1999 Nev. Stat. 2634) however, states that the provisions of the Act addressing forfeiture and abandonment of Nevada water rights do not apply to water rights that were challenged in any legal or administrative proceeding as of April 1, 1999, which includes the water rights in this case.

The Newlands Project diverts water from the Truckee River into the Truckee Canal, which joins the Carson River at Lahontan Reservoir. Pet. App. A6. Water from the Truckee Canal is used to irrigate nearby lands in the "Truckee Division" of the Project. The combined waters of the Truckee Canal and the Carson River in Lahontan Reservoir provide water to irrigate lands in the "Carson Division" of the Project. *Ibid.*

Water rights in the Truckee Division of the Project are governed by the *Orr Ditch* decree, which awarded the United States the right to divert a specified amount of water from the Truckee River with a priority date of July 2, 1902. See *United States* v. *Orr Water Ditch Co.*, In Equity, Docket No. A3 (D. Nev. Sept. 4, 1944) (reprinted in part at Pet. App. E1-E19). Water rights in the Carson Division are governed by the *Alpine* decree, which awarded the United States the right to divert and store the entire flow of the Carson River as it reaches Lahontan Dam, also with a priority date of July 2, 1902. See *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), aff'd, 697 F.2d 851 (9th Cir.), cert. denied, 464 U.S. 863 (1983).

The Truckee River terminates in, and is the main source of water for, Pyramid Lake. That lake, which is "widely considered the most beautiful desert lake in North America," *Nevada* v. *United States*, 463 U.S. 110, 114 (1983), is the central feature of the Pyramid Lake Paiute Tribe's reservation and habitat for two species of fish listed under the Endangered Species Act, 16 U.S.C. 1531 *et seq.* Pet. App. 6-7. The Newlands Project's diversions of water from the Truckee River have adversely affected the size and ecology of the lake and are largely responsible for the threats to the lake's fish. *Id.* at 7. The United States is required by court

order and by statute to ensure that water diversions from the Truckee River are limited to those waters necessary to serve valid water rights of Project water users. See Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, §§ 202, 209, 104 Stat. 3294, 3317; *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973).

3. The Town of Fernley filed an application with the Nevada State Engineer to change the manner and place of use of 26 Project water rights it had acquired for use of water from the Newlands Project. Those water rights encompassed a total of roughly 280 acre-feet of Project water. Pet. App. A6. The United States and the Tribe filed protests to the application on several grounds, including an objection that the water rights proposed for transfer had been forfeited or abandoned under state law and therefore could not be transferred. *Id.* at A7. Those protests are subject to a series of federal court rulings that govern challenges to transfer applications. See *id.* at A9.

The legal disputes culminating in the 1980 *Alpine* decree established that applications for transfers of Newlands Project water rights are to be directed to the State Engineer, who has primary administrative jurisdiction under Nevada law to review such applications. See *United States* v. *Alpine Land & Reservoir Co.*, 697 F.2d 851, 857-858 (9th Cir.), cert. denied, 464 U.S. 863 (1983) (*Alpine I*); see also Nev. Rev. Stat. Ann. §§ 533.345, 533.370 (Michie 1995). The decision further states that appeals from the State Engineer's determinations are to be taken to the United States District Court for the District of Nevada, which expressly retained jurisdiction to supervise and enforce its decree. *Alpine I*, 697 F.2d at 857-858.

After the *Alpine* decree became final, many farmers who used Project water filed applications to transfer water rights from an existing location to other locations within the Project area. The Tribe challenged certain transfers on various grounds, including the ground that the water rights proposed for transfer had been forfeited or abandoned and therefore were not valid rights available for transfer. *United States* v. *Alpine Land & Reservoir Co.*, 878 F.2d 1217 (9th Cir. 1989) (*Alpine II*). The district court held that Nevada law was inapplicable to the validity of the transfer applications, but the court of appeals disagreed, reversing the district court's decision and remanding the case for further proceedings. *Ibid.*; see also Pet. App. A9.

Following that remand, the State Engineer ruled that, for the purposes of applying the state forfeiture statute, the water rights of all individual users in the Newlands Project vested on July 2, 1902, the priority date assigned by the *Orr Ditch* and *Alpine* decrees to the Newlands Project water rights as decreed to the United States. Because the forfeiture statute did not apply to water rights vesting prior to March 22, 1913, the Engineer concluded that the water rights of individual users of Newlands Project water were not subject to forfeiture. The district court affirmed the State Engineer's determinations respecting forfeiture, but the court of appeals reversed the district court's decision. *United States* v. *Alpine Land & Reservoir Co.*, 965 F.2d 731 (1992), as amended, 983 F.2d 1487 (9th Cir. 1993) (*Alpine III*); see Pet. App. A9-A10. The court of appeals held that the applicability of the state forfeiture statute was determined not by the United States' 1902 priority date for the Project as a whole, but rather by the date on which each individual water user initiated the appropriation of water from the Project

and took the first steps to put the water to beneficial use on a particular farm parcel. 983 F.2d 1495-1496.

The court of appeals reasoned that, according to the Nevada Supreme Court, the Nevada legislature's purpose in exempting pre-1913 rights from impairment by the new water law regime was "'to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act.'" *Alpine III*, 983 F.2d at 1496 (quoting *In re Manse Spring*, 108 P.2d 311, 315 (Nev. 1940)). The court of appeals accordingly determined that, because the purpose of Section 533.085(1) of Nevada Revised Statutes Annotated was to insulate from forfeiture those water rights where "appropriations have been initiated" (Nev. Rev. Stat. Ann. § 533.085(1) (Michie 1995)), "it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land." 983 F.2d at 1496; see Pet. App. A12-A13. The court held that "[i]f the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060." 983 F.2d at 1496; see Pet. App. A14.

4. Notwithstanding the United States' and the Tribe's protests, the Nevada State Engineer approved Fernley's application to change the manner and place of use of the water rights in this case. Pet. App. C1. The State Engineer determined, among other things, that the water rights in Fernley's transfer application were not subject to forfeiture under Nevada's forfeiture statute because the appropriation of those rights was initiated prior to March 22, 1913. *Id.* at A8, C9. The State Engineer was of the view that *Alpine*

III addressed only the question of when Newlands Project water rights vested in the individual users and not when appropriations were initiated. He concluded that appropriation of the rights was initiated on July 2, 1902, the priority date confirmed to the Project water rights as a whole.

To reach that conclusion, the State Engineer applied the State's "relation back" doctrine, under which a water right's priority date is determined by the time when the first step was taken to secure it. Pet. App. C7-C8. The Engineer concluded that the first step was taken to secure the rights for all Newlands Project water users when the United States obtained water rights for the Project as a whole in 1902. *Ibid.* Despite his conclusion that none of the rights were subject to forfeiture, the State Engineer nevertheless conducted a factual analysis to determine whether, if the court were to determine that the rights were initiated on the date the users took their first steps to obtain water from the Project, any of the rights would be forfeited. The Engineer found that forfeiture had been proven with respect to only one of the water rights proposed for transfer. See *id.* at C10-C13; see also *id.* at A19.

The State Engineer also made factual determinations as to whether any of the water rights had been abandoned. Water rights that were initiated prior to March 22, 1913, are not subject to forfeiture but are subject to abandonment. The Engineer found that the record contained no evidence of intent to abandon any of the water rights. Pet. App. C13-C14.

5. The district court affirmed the ruling of the Nevada State Engineer. Pet. App. B1-B21. On the question of forfeiture, the district court affirmed the State Engineer's ruling that all of the water rights were exempt from forfeiture under Section 533.085 of

Nevada Revised Statutes Annotated. The district court did not address the State Engineer's analysis or *Alpine III*. Instead, the district court determined that the *Orr Ditch* decree awarded a July 2, 1902, priority date for all individual water rights within the Newlands Project governed by the decree–and that, for the purposes of Section 533.085 of the Nevada Revised Statutes Annotated, appropriation of the water rights of individual users of Newlands Project water was initiated on that date. *Id.* at B5-B20. The district court did not address the State Engineer's factual determinations as to whether the water rights had been forfeited, see *id.* at A19, but affirmed the State Engineer's ruling that none of the water rights at issue had been abandoned, *id.* at B20.

6. The court of appeals reversed the district court's judgment. Pet. App. A1-A26. On the issue of forfeiture, the court of appeals concluded that the question of how to interpret the forfeiture exemption had been previously decided in *Alpine III*. The court of appeals rejected the State Engineer's argument that the forfeiture ruling in *Alpine III* pertained only to when Project water rights were vested in the individual users and not to when appropriation of those rights was initiated. *Id.* at A14-A16. The court reiterated its reasoning in *Alpine III*: The purpose of the forfeiture exemption was to alleviate concerns about unfairness and unconstitutionality and that, given that purpose, the term "initiated" should not be read to refer to the date on which the United States obtained a water right for the entire Project, regardless of when individual farmers actually obtained the right to irrigate their lands. *Id.* at A13. The court of appeals further held that "the district court made the same error when, in affirming the Engineer, it concluded that because each

individual Project water right had a 'priority date' of July 2, 1902, it was therefore initiated, within the meaning of § 533.085, on that same date." *Id.* at A14.[3]

The court did not review the State Engineer's factual findings on forfeiture because the district court had not ruled on them and the underlying factual evidence before the Engineer was not in the record. The court of appeals instead remanded the case to the district court to review those findings, noting that it appeared that the Engineer had imposed a burden of proof stricter than the applicable "clear and convincing evidence" standard. Pet. App. A19-A20. The court of appeals also reversed the district court in part with respect to abandonment and similarly remanded for review of the relevant factual determinations by the State Engineer. *Id.* at A16-A18, A20-A22. Judge Noonan dissented from the court of appeals' forfeiture ruling. *Id.* at A22-A24.[4]

ARGUMENT

The interlocutory decision of the court of appeals is correct and does not conflict with any decision of this Court, any other court of appeals, or any state court of

---

[3] The court of appeals noted that the State Engineer and TCID had filed a petition for rehearing and rehearing en banc in *Alpine III*, arguing that the decision failed to recognize the distinction between when a water right "vested" and when appropriation was "initiated." The court found further support for its understanding that *Alpine III* governed both questions in the fact that the *Alpine III* court subsequently amended the opinion specifically to refer both to when water rights were vested and when their appropriation was initiated. Pet. App. A17-A18.

[4] The court of appeals has since applied and followed its forfeiture ruling in this case in deciding another appeal involving related issues. See *United States* v. *Alpine Land & Reservoir Co.*, 279 F.3d 1189, 1199 (9th Cir. 2002) (*Alpine V*).

last resort. The decision simply resolves a narrow question of state law pertinent to a particular water right dispute and remands the case to the district court for application of that law in light of the relevant facts. Review of that decision is accordingly unwarranted.

1. As a threshold matter, review is unwarranted because of the interlocutory posture of the case. The court of appeals identified the appropriate legal standard for determining whether the water rights of individual users of Newlands Project water are subject to forfeiture, but it did not apply those legal standards to the facts of this case. The court of appeals correctly discerned that the district court has not yet reviewed the State Engineer's factual findings respecting forfeiture, and the court of appeals properly chose to remand the case to the district court to review those factual determinations as well as his factual determinations respecting abandonment. The outcome of that review will directly affect the determination of the United States' and the Tribe's challenges to the water rights transfers ultimately at issue. Any challenge that petitioners may have to the court of appeals' interlocutory decision accordingly is not yet ripe for this Court's review. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"); see also *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); see generally Robert Stern et al., *Supreme Court Practice* 195-198 (7th ed. 1993).

2. Petitioners contend that the court of appeals was wrong in its construction of state law. Nevada Pet. 8-16, 25-27; TCID Pet. 11-17. This Court, however, ordinarily "accept[s] and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). See *Supreme Court Practice*, *supra*, at 183 ("The Court uniformly declines review whenever the court of appeals has reached a reasonable and permissible result."). This case provides no occasion for the Court to deviate from its normal practice.

Petitioners suggest that review is appropriate based on this Court's action in *Leavitt* v. *Jane L.*, 518 U.S. 137 (1996) (per curiam). See Nevada Pet. 9. That exceptional case, however, posed clearly distinguishable circumstances. In *Leavitt*, this Court examined a federal court of appeals' construction of a state abortion law because that court's "extraordinary" ruling was "plainly wrong," resulted in "the total invalidation of a state-wide law," and amounted to "blatant federal-court nullification of state law." 518 U.S. at 144-145. The Court recognized that it had not previously granted certiorari solely to review a state law issue since *Steele* v. *General Mills, Inc.*, 329 U.S. 433 (1947), which involved "a federal court's equivalently clear misinterpretation of a state law of equivalent significance." 518 U.S. at 144 n.5; see *id.* at 147 (Stevens, J., dissenting).[5]

---

[5] The other cases that Nevada cites (Pet. 9 n.6) do not support its request for certiorari solely to obtain review of a state law question. In *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985), the Court made the unexceptional observation that "we surely have the authority to differ with the lower federal courts as to the meaning of a state statute." *Id.* at 500. In the other cases, the Court merely affirmed federal court rulings on state law in the

The court of appeals' ruling in the instant case does not involve an extraordinary ruling on a controversial matter of constitutional magnitude or invalidate a state-wide law. To the contrary, the panel decision affects a very narrow range of water rights under a federal court decree. By its terms, the decision applies only to determining whether the water rights of individual users of Newlands Project water are subject to forfeiture, and not whether the rights have actually been forfeited. The decision is further narrowed by recent amendments to Nevada's forfeiture statute. See note 2, *supra*. On June 9, 1999, the Nevada legislature amended the statute to exempt surface water rights in Nevada from statutory forfeiture and excluded from that exception only water rights that were under administrative or legal challenge as of April 1, 1999. See § 7, 1999 Nev. Stat. 2634, cited at Pet. App. A7. Thus, the effect of the court of appeals' ruling on water rights other than those involved in this case is limited. Even with respect to those water rights at issue here, the practical consequences are diminished because the Nevada legislature also established a fund to compensate holders of water rights for the value of rights that were subject to an administrative or legal challenge as of April 1, 1999. See § 5(4)(e), 1999 Nev. Stat. 2633. Holders of water rights that might otherwise be

---

course of reviewing federal law questions. See *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527 (1960) (affirming a court of appeals' state law ruling that was not "clearly erroneous or unreasonable"); *The Tungus* v. *Skovgaard*, 358 U.S. 588, 596 (1959) (upholding a court of appeals' construction of a state statute that was carefully considered and not clearly wrong); *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949) (accord); *Palmer* v. *Hoffman*, 318 U.S. 109, 118 (1943) (refusing to set aside a federal court's application of state law where there was no showing of plain error).

subject to forfeiture under the court of appeals' decision may opt to retire their water rights in accordance with that program and avoid any application of the forfeiture law to them.

3. Even if this case presented a matter of sufficient importance to warrant review, there would be no occasion to set aside the court of appeals' construction of state law. This Court does not disturb a court of appeals' construction of state law unless it is unreasonable or plainly wrong. See, *e.g.*, *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); *The Tungus* v. *Skovgaard*, 358 U.S. 588, 596 (1959). The court of appeals' decision here is neither. That decision reasonably construes Nevada's forfeiture law in the specific context of the Newlands Project. The court of appeals, both in *Alpine III* and the instant case, applied state law in light of its express terms and the underlying purpose of the forfeiture exemption provision, as set out by the Nevada Supreme Court in *Manse Spring. Alpine III*, 983 F.2d at 1496; Pet. App. A11-A12.

The court of appeals correctly recognized that Nevada's forfeiture-exemption provision is intended to insulate from forfeiture the pre-1913 rights of water users. Nev. Rev. Stat. Ann. § 533.085(1) (Michie 1995). Thus, in determining when "appropriations have been initiated" (*ibid.*), the statute requires the court to look not at when the United States acquired the right to store water for the Project, but at when the individual water user whose right might be subject to forfeiture first obtained the right to irrigate his land. *Alpine III*, 983 F.2d at 1496. That reasonable interpretation places Newlands Project water users in the same position as holders of water rights elsewhere in the State. It also avoids the anomalous result of granting a forfeiture exemption to all users of Project water—some of whom

did not obtain their water contracts and apply water to land until the 1940s and 1950s (see *Alpine II*, 878 F.2d at 1221 n.7)—based on the United States' actions in 1902. See *Alpine III*, 983 F.2d at 1496; Pet. App. A12-A16.

The court of appeals correctly rejected petitioners' view that the actions of the United States in acquiring a water right for the Project as a whole should be treated as the actions of the individual water users in "initiat-[ing]" their own appropriations. Pet. App. A12-A13. As the court explained, that construction "would protect water-right holders who had done nothing at all to acquire water rights as of the date of the forfeiture statute" and would insulate from forfeiture those who had full notice "that any water rights they acquired would be subject to forfeiture." *Id.* at A13. In any event, even if petitioners' interpretation provided a plausible alternative construction of state law, the fact remains that the court of appeals' construction, grounded in Nevada case law and carefully analyzed in two separate opinions, is reasonable and certainly not plainly wrong.

Petitioners also assert that the decision nullifies state water law and conflicts with the Nevada Supreme Court's decision in *Manse Spring*. Nevada Pet. 12-16; TCID Pet. 11-17. Those arguments are without merit. The *Alpine III* decision expressly recognized that "[d]etermining when [water] rights vested is a matter of Nevada law." 983 F.2d at 1495. Both the *Alpine III* court and the court of appeals in the instant case expressly relied on the Nevada Supreme Court's ruling in *Manse Spring* to discern the purpose of Section 533.085 of the Nevada Revised Statutes Annotated. Indeed, when the Tribe in *Alpine III* moved to certify the threshold forfeiture question to the Nevada

Supreme Court, the Nevada State Engineer opposed certification, and the court of appeals declined to certify "[b]ecause the law of Nevada is clear." *Alpine III*, 983 F.2d at 1491 n.3.[6]

4. Petitioners also contend that review is warranted because the decision is a collateral attack on the *Orr Ditch* decree and conflicts with this Court's ruling in *Nevada* v. *United States*, 463 U.S. 110 (1983). Nevada Pet. 21-23; TCID Pet. 7-11. Petitioners argue that the *Orr Ditch* decree confirmed a right in the United States to water for the Newlands Project with a priority date of July 2, 1902, and that *Nevada* ruled that the individual users of Project water were the successors to the right affirmed to the United States in the *Orr Ditch* decree. The court of appeals, however, expressly rejected the contention that its decision concerning the meaning of the forfeiture statute was determined by the water rights' priority date. The court "agree[d] with the Engineer and the district court that the priority date for all of the rights at issue in this case is 1902." Pet. App. A14. The court explained, however, that its holding "did not concern a priority date" but rather concerned "the forfeiture exemption provided by § 533.085." *Ibid.* For the same reasons, the decision does not conflict with this Court's decision in *Nevada*.

---

[6] There is also no merit to Nevada's assertion (Pet. 13) that the validity of the court of appeals' decision is suspect because the panel consisted of judges from California and Arizona. This is not a case of state law being construed by "'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). *Alpine III*, which provides the rule for the instant decision, was authored by Judge Brunetti, who practiced law in Nevada for 21 years prior to his appointment to the bench in 1985. See 2 *Almanac of the Federal Judiciary* 51 (2002).

Nevada held that water users in the Newlands Project succeeded to the rights confirmed in the *Orr Ditch* decree and that res judicata principles precluded the United States from using those rights for other purposes. This case does not address the priority date of the water rights in question, and it does not work any reallocation of rights confirmed in the decree.

5. Finally, petitioners assert that the decision improperly applies the concept of reasonable investment-backed expectations to Nevada water law and conflicts with *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). See Nevada Pet. 17-21; TCID Pet. 18-19. The court of appeals, however, made no ruling regarding the application of takings law to Nevada's forfeiture statute. Contrary to petitioners' assertions, the court did not rule on background principles of state law and did not "apply" the doctrine of reasonable investment-backed expectations to Nevada water law. The court simply used the "modern parlance" of takings law, specifically the terminology of reasonable investment-backed expectations, to explain its understanding of the purposes of the Nevada legislature in enacting the forfeiture exemption provision. See Pet. App. A12. The court's use of takings parlance merely elucidated its understanding of the legislature's concerns and how the forfeiture exemption should be construed in light of those concerns. Because the court of appeals did not rule in any manner on the application of takings jurisprudence to water rights at the Newlands Project, its decision does not and cannot conflict with *Palazzolo*, which addressed distinct issues of just compensation law that do not affect the outcome of this case. See, *e.g.*, *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

WILLIAM B. LAZARUS
KATHERINE J. BARTON
Attorneys

APRIL 2002

Supreme Court, U.S.
FILED
APR 26 2002
OFFICE OF THE CLERK

Nos. 01-1224, 01-1226

In The

Supreme Court of the United States

TRUCKEE CARSON IRRIGATION DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

STATE OF NEVADA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

ROBERT S. PELCYGER*
FREDERICKS, PELCYGER & HESTER, LLC
1075 South Boulder Road, Suite 305
Louisville, Colorado 80027
Telephone: (303) 673-9600

Attorneys for Respondent Pyramid Lake Paiute Tribe of Indians

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BRIEF FOR THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

Respondent Pyramid Lake Paiute Tribe of Indians joins and adopts the BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI. The Tribe opposes the petitions for the reasons stated by the United States.

Respectfully submitted,

ROBERT S. PELCYGER*
FREDERICKS, PELCYGER & HESTER, LLC
1075 South Boulder Road, Suite 305
Louisville, Colorado 80027
Telephone: (303) 673-9600

Attorneys for Respondent Pyramid Lake Paiute Tribe of Indians

**Counsel of Record*

April 2002

Supreme Court, U.S.
FILED
MAY 7 2002
CLERK

No. 01-1224

In the
Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioners,

vs.

UNITED STATES

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*

No. 01-1224

In the
Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioners,

vs.

UNITED STATES

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. REVIEW OF THIS CASE IS NECESSARY BECAUSE THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH AN OPINION OF THIS COURT, IS IN DIRECT CONFLICT WITH RULINGS BY THE SUPREME COURT FOR THE STATE OF NEVADA, AND, IF LEFT TO STAND, THE ADVERSE IMPACT OF THE DECISION WILL REACH FAR BEYOND THE ACTUAL PARTIES TO THIS CASE 2

B THE UNITED STATES HAS TAKEN OPPOSING POSITIONS ON THESE ISSUES IN DIFFERENT CASES TO WHICH IT IS A PARTY, LEAVING THE POTENTIAL FOR CONFLICT BETWEEN COURTS CONFRONTED WITH THE ISSUE OF APPROPRIATION OF WATER RIGHTS WITHIN RECLAMATION PROJECTS 6

C. THIS CASE IS RIPE FOR APPEAL BECAUSE THE LEGAL ISSUES AT STAKE ARE FUNDAMENTAL TO THE FINAL DISPOSITION OF THIS ACTION 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Ickes v. Fox, 300 U.S. 82 (1937) 3

Michael v. United States, 454 U.S. 950, 951-952 (1981) 10

Nebraska v. Wyoming, 325 U.S. 589 (1945) 3

Nevada v. United States, 463 U.S. 110, 143-145 (1983) 1, 3-5

Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 543-544 (1869) 5

Riggett v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 605 (9th Cir. 1996) 9

Robert Stern et al., *Supreme Court Practice* 196 (7th ed. 1998) 10

United States v. Alpine Land & Reservoir Co., (9th Cir. 1992) ("*Alpine III*") 2

United States v. General Motors Corp., 323 U.S. 373, 377 (1945) 10

OTHER

Robert Stern et al., *Supreme Court Practice* 196 (7th ed. 1998) 10

I. INTRODUCTION

In its Response Brief, the United States attempts to present the issues to be decided in this case as narrow and limited. However, the issues presented have far ranging impacts on every federal reclamation project and potentially on every person who derives their water rights from the United States under the western water law doctrine, known as prior appropriation. In 1944, as a result of a negotiated settlement entered into by a number of parties including the United States, the Orr Ditch Decree was entered, ending what was the final adjudication of all of the rights to the use of water from the Truckee River in Nevada. *See Nevada v. United States*, 463 U.S. 110, 143-145 (1983). Since that time, the United States has engaged in a series of efforts (this being the latest) to obtain additional water from the Truckee River for the benefit of the Pyramid Lake Indian Reservation. Certainly, the United States must acknowledge that the present case adversely affects water users within the Newlands Reclamation Project, but beyond that the Court of Appeals decision at issue also establishes the dangerous precedent of undermining the finality of water rights adjudications and rewriting state law with respect to water rights in the western states in order to reallocate that water to the Pyramid Lake Paiute Indian Tribe in contradiction of the prior orders of this Court. The decision also conflicts with orders and rulings of other western states with respect to substantially identical issues, most notably the State of New Mexico.

II. ARGUMENT

A REVIEW OF THIS CASE IS NECESSARY BECAUSE THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH AN OPINION OF THIS COURT, IS IN DIRECT CONFLICT WITH

RULINGS BY THE SUPREME COURT FOR THE STATE OF NEVADA, AND, IF LEFT TO STAND, THE ADVERSE IMPACT OF THE DECISION WILL REACH FAR BEYOND THE ACTUAL PARTIES TO THIS CASE

The Court of Appeals held that the United States did not initiate the appropriation of water rights in 1902 under Nevada law when it began the Newlands Reclamation Project.[1] In so doing, the Court of Appeals decision reverses United States Supreme Court precedent regarding the appropriation of water rights within reclamation projects, ignores United States Supreme Court precedent with respect to the finality of the Orr Ditch Decree and the priority date to be given to water rights within the Newlands Reclamation Project, reverses Nevada Supreme Court precedent regarding the initiation and appropriation of water rights and the relation back doctrine,

---

[1] In holding that the water rights were not initiated in 1902, the Court of Appeals relied, mistakenly, on the decision in *United States v. Alpine Land & Reservoir Co.*, (9th Cir. 1992) ("*Alpine III*"). The issue in *Alpine III* was whether the water rights had *vested* in 1902. The issue here is whether the water rights had been *initiated* in 1902. Reliance upon the *Alpine* line of cases is misplaced as it concerns the adjudication of water rights stemming from the Carson River, as opposed to the Truckee River waters at issue in this case. Unlike *Alpine*, the roots of this case are found in the Orr Ditch Decree, a negotiated settlement of the water rights entered into by a number of parties including, importantly, the United States. The *Alpine* decisions were both reviewed and criticized by the District Court in its review of this case and, for the reasons articulated in the District Court's opinion, the *Alpine* decisions are not dispositive of the issues presented in this Petition. *See* Appendix to Petition for Writ of Certiorari, B-1.

and, finally undermines the Reclamation Act of 1902.

This Court, on at least three separate occasions addressed the issue of the appropriation of water rights within reclamation projects in the context of discussing the ownership of water rights in irrigation projects built pursuant to the Federal Reclamation Act of 1902. In *Nevada v. United States*, the Court outlined the history of the initiation of water rights within the Newlands Reclamation Project beginning in 1902, and, consistent with that history and the Orr Ditch Decree, held that the priority date for the water rights within the Project is 1902, the date when the project was initiated. *See Nevada v. United States*, 463 U.S. 110, 115-117 (1983). The Court also addressed the fact that within federal reclamation projects, the government is the initial appropriator when it begins the construction of a reclamation project. The Court in *Nevada v. United States* wrote, in part, as follows:

> In two leading cases, *Ickes v. Fox*, 300 U.S. 82 (1937), and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), this Court has discussed the beneficial ownership of water rights in irrigation projects built pursuant to the Reclamation Act. In *Ickes v. Fox*, the Court said: "Although *the government diverted, stored and distributed the water*, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. *Appropriation was made* [by the United States] *not for the use of the government, but, under the Reclamation Act, for the use of the land owners.*"

Nevada v. United States, 463 U.S. 110, 122-123 (1983), *quoting Ickes v. Fox*, 300 U.S. 82, 94-96 (1937) (*emphasis added*); *see also Nebraska v. Wyoming*, 325 U.S. 589, 613-614 (1945) (adopting above quoted language from *Ickes v. Fox*). Three times, this Court recognized that the government is the initial

appropriator of water within federal reclamation projects built pursuant to the Reclamation Act of 1902. The water rights were initiated by the government through the withdrawal of lands and the construction of means to divert, store and distribute the water, and the water rights were perfected by the end water users at various times after that date. *Nevada v. United States, supra.* In the case of the Newlands Reclamation Project, the priority date of those water rights relates back to the date of the first act of appropriation in 1902 regardless of the date the water rights ultimately were perfected. *Id.* In ruling, therefore, that the United States did not initiate the appropriation of the water rights here in dispute in 1902, the Court of Appeals goes against established United States Supreme Court precedent that when the United States began the reclamation projects, it initiated the appropriation of the project water rights. In addition, it should be noted that as a practical matter, there can only be one appropriation of the water.

The Court of Appeals decision also undermines this Court's opinion *Nevada v. United States* upholding the finality of the Orr Ditch Decree and rejecting the United States' attempt to circumvent the rights decreed in the Orr Ditch case. *See Nevada v. United States,* 463 U.S. 110 (1983). Although the United States claims not to dispute the rights decreed in the Orr Ditch case, as this Court found in *Nevada v. United States,* that is exactly what the United States is attempting to do. The Court of Appeals decision facilitates this by holding that the United States did not initiate the appropriation of water rights in 1902 with the passage of the Reclamation Act and the construction of the Newlands Reclamation Project. In so holding, the Court of Appeals permits the application of Nevada's forfeiture law to water rights within the federal reclamation project despite the "savings clause" built into that statute that exempts from application of the forfeiture law those water rights whose appropriation was initiated prior to

1913. The net result is that through the misapplication of the forfeiture law, the United States is able to increase water available for the Pyramid Lake Reservation and increase the limited amount of water compromised by the United States in the Orr Ditch case for the benefit of the Pyramid Lake Indian Reservation in violation of its statutory fiduciary obligations to the farmers within the Project.

As discussed at length in the Petition for Writ of Certiorari, the Court of Appeals decision also is in direct conflict with opinions of the Nevada Supreme Court which hold that a water right is "initiated" when the first steps are taken to appropriate the water. *See Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869). As long as the appropriator is proceeding with due diligence to apply the water to beneficial use, once the water is actually put to beneficial use, the priority date of the water right will relate back to the date when the first step was taken to appropriate the water. *Id.* By definition, then, under Nevada law and as explained by the Nevada Supreme Court, the priority date and the date the water right was first initiated is always one and the same. *Id.* In the present case, the undisputed priority date for the subject water rights is 1902, a conclusion supported by both Nevada law and the unanimous United States Supreme Court's ruling in *Nevada v. United States.* In further support of this conclusion, the Orr Ditch Decree memorializes the first acts of appropriation initiated by the United States and specifically holds that the United States proceeded with due diligence to construct the canal and irrigation system through which the water eventually was put to beneficial use and holds that the resulting priority date for the water rights is July 2, 1902. Accordingly, when the Court of Appeals held that Nevada's forfeiture statute applies to water rights within the federal reclamation project because it believes that the water rights were not initiated by the government in 1902, and the first act of appropriation occurred when the farmers diverted

water from the district's canals and applied it to a beneficial use, the Court of Appeals' opinion runs afoul of established decisions of the United States Supreme Court, the Supreme Court for the State of Nevada, and the Orr Ditch Decree.

In its Response, the United States attempts to avoid review of this destabilizing precedent by arguing that the issues brought before this Court by Petitioner are not worthy of the Court's consideration because they will only impact a "very narrow range" of water rights. *See* Brief in Opposition, p. 18. First, the mere fact that the Court of Appeals decision is in direct conflict with United States Supreme Court and Nevada Supreme Court precedent regarding the priority dates and the initiation of water rights within federal reclamation projects warrants review by this Court. Beyond that, however, are dangerous implications for all reclamation projects in the western states. If the Court of Appeals decision is permitted to stand, any provision of state law enacted after the initiation of a federal reclamation project or even after 1902 has the potential to defeat an otherwise valid project water right by denying the vested water right owner the full set of rights that apply to the early priority date acquired by the United States and creates a subset of junior priority water rights subject to unwarranted regulation or even termination under the Circuit Courts' analysis.

B THE UNITED STATES HAS TAKEN OPPOSING POSITIONS ON THESE ISSUES IN DIFFERENT CASES TO WHICH IT IS A PARTY, LEAVING THE POTENTIAL FOR CONFLICT BETWEEN COURTS CONFRONTED WITH THE ISSUE OF APPROPRIATION OF WATER RIGHTS WITHIN RECLAMATION PROJECTS

In the present case, the United States took the position, and the Court of Appeals adopted the conclusion, that "the

applicability of the state forfeiture statute was determined not by the United States' 1902 priority date for the Project as a whole, but rather by the date on which each *individual* water user initiated the appropriation of water from the Project and took the first steps to put the water to beneficial use on a particular farm parcel." *See* United States' Brief in Opposition, p. 6-7 (*emphasis added)*. The United States has taken the position in the present case that the issue of appropriation and priority date should be decided on a parcel by parcel, tract by tract basis, and that the individual water users are not entitled, through the doctrine of relation back, to the application of a common priority date of 1902 for purposes of applying the principles of forfeiture or abandonment. The United States, however, argues the exact opposite in another case now pending in state court, namely *State of New Mexico v. Lewis*.[2]

In the United States' Brief filed on January 18, 2002 in the New Mexico case,[3] the United States takes the following

---

[2] TCID requests that the Court take judicial notice of the *New Mexico v. Lewis* decision and the United States' Brief filed in connection therewith. For the Court's convenience, the District Court's Supplemental Decision and Order in *New Mexico v. Lewis*, Case Nos. 20294 and 22600, Fifth Judicial District, County of Chaves, State of New Mexico (2001), is reproduced in the Appendix to this Reply to United States' Brief in Opposition, at p. B-1. The *United States' Objections, Comments, and Suggestions to the Court's December 19, 2001, Supplemental Decision and Order and Brief on Certain Matters Requested by the Court* ("United States Brief") filed in that case is reproduced in the Appendix to this Reply to United States' Brief in Opposition at p. A-1.

[3] *New Mexico v. Lewis* deals with the water rights adjudications and not transfers, but this has no effect on the outcome of the analysis.

position with respect to appropriation, priority date, and the doctrine of relation back:[4]

> New Mexico law recognizes that water rights are appropriated for Reclamation projects differently than by individual irrigators and that water is not distributed to the irrigators in accordance with a priority date as would be done if they were the actual appropriators of the water rights.
>
> If the Court ultimately determines that a priority date should be determined for each CID member, then the priority dates for all the members must be the same as the Project based upon relation back. The relation back principle holds that the priority date of a completed project water right will relate back to the date when work on the diversions or other project works began so long as the work has been pursued with due diligence ...
>
> There is no question that the work was carried on with due diligence to bring water to all 25,055 Project acres. Thus, any water rights adjudicated to CID members would have the priority date of the Project based upon relation back.

---

[4] Relying on the Ninth Circuit "Alpine" decisions, the plaintiffs in the New Mexico case assert that in establishing priority dates on a reclamation project the state recognized "relation back" doctrine does not apply and the priority date is established on a tract by tract basis. The court concluded in its preliminary ruling that "[I]ssues and controversies remain as to whether Project priority dates should be included in subfile orders of individual members of CID or whether individual priority dates based upon when water was devoted to beneficial use as on a relation back basis must be determined (B-53 and B-56).

United States' Brief, Appendix at p. A-16 to A-18 (*internal citations omitted)*. In the Newlands Project, as in New Mexico, the water rights are apportioned on a pro rata basis with a common projectwide priority date of 1902. The United States in the present case argues that the doctrine of relation back does not apply and that individual water users are not entitled to a 1902 priority date and the benefits that derive therefrom. This position is completely the reverse of the position taken by the United States in the New Mexico case under facts that are similar if not identical. The United States should be judicially estopped (*See Riggett v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996) from asserting this position in the present case given the fact that it has argued in another case that the doctrine of relation back does apply to water rights within a federal reclamation project and that individual water users are entitled to the protection of the early priority date based on the initiation of the first acts of appropriation by the government in constructing the reclamation project.

C. THIS CASE IS RIPE FOR APPEAL BECAUSE THE LEGAL ISSUES AT STAKE ARE FUNDAMENTAL TO THE FINAL DISPOSITION OF THIS ACTION

Contrary to the position taken by the United States in its Response, this case is ripe for appeal. As acknowledged by the United States' in its Response, the Court of Appeals decision specifically defined the legal standard to be applied to forfeiture claims. The remainder of the case rises and falls on the Court of Appeals decision regarding forfeiture and its application to the water rights in question. In sum, the issue of whether the forfeiture law applies to the water rights at issue in this case is fundamental to the remainder of the lawsuit. Where there is an important and clear-cut issue of law that is fundamental to the further conduct of the case, the case

may be reviewed despite its interlocutory status. *See* Robert Stern et al., *Supreme Court Practice* 196 (7th ed. 1998); *see also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) ("The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case"); *Michael v. United States*, 454 U.S. 950, 951-952 (1981) ("Where there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review.")

III. CONCLUSION

Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari.

Dated: San Francisco, California
May 1, 2002

Michael Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
Attorneys for Petitioners
221 Main Street, 16th Floor
San Francisco, California 94105
Telephone: 415/905-0200
* *Counsel of Record*

Supreme Court, U.S.
FILED
MAY 7 2002
CLERK

No. 01-1224

In the
Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioners,

vs.

UNITED STATES

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

APPENDIX TO REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*

110 pp

No. 01-1224

In the
Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioners,

vs.

UNITED STATES

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

APPENDIX TO REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

Michael J. Van Zandt*
Craig A. Pridgen
Elizabeth P. Ewens
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
* *Counsel of Record*

TABLE OF CONTENTS

United States' Objections, Comments and Suggestions to the Court's December 19, 2001 Supplemental Decision and Order and Brief on Certain Matters Requested by the Court A-1

Supplemental Decision and Order B-1

STATE OF NEW MEXICO COUNTY OF CHAVES STATE OF NEW MEXICO	)	
STATE OF NEW MEXICO, ex rel. THOMAS C. TURNEY, State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT, Plaintiffs, vs. L.T. LEWIS, et al., UNITED STATES OF AMERICA, Defendants,	)	Nos. 20294 and 22600 CONSOLIDATED Carlsbad Irrigation District Section Membership Phase

UNITED STATES' OBJECTIONS. COMMENTS. AND SUGGESTIONS TO THE COURT'S DECEMBER 19, 2001. SUPPLEMENTAL DECISION AND ORDER AND BRIEF ON CERTAIN MATTERS REQUESTED BY THE COURT

The United States of America ("United States"), by and through its undersigned counsel, hereby provides its objections, comments, and suggestions to the Court's

December 19, 2001. Supplemental Decision and Order ("Supplemental Decision") and memorandum briefs on certain matters as requested by the Court in the Supplemental Decision. For the Court's convenience, the United States provides its comments and/or brief on each of the Court's decisions in the order presented in the Supplemental Decision.

I. THE COURT'S DECISION:

> *Other parties have not specifically responded to the arguments of the United States that in order to have private water rights independently of those afforded through the diversion and storage of Project water members of CID would have to have an independent contract under the Warren Act. Counsel and interested parties are granted leave to respond.*

Supplemental Decision at 13.

A. United States Objections, Comments, Suggestions:

The United States comments that the Court's characterization of the United States' position on the Warren Act is incorrect. The Court's characterization of the United

States' position should be changed as follows: "In order to have **any** private, **non-Project** water rights ~~independently of those afforded through the diversion and storage of Project water~~ **diverted through or stored by Carlsbad Project facilities,** members of CID would have to have an independent contract **with the United States** under the Warren Act." See Act of February 21, 1911, ch. 141,36 Stat. 925; J. B. Bean v. United States, 163 F. Supp. 838, 841 (Ct. Cl. 1958).[1]

Further, the United States would like to comment that the membership phase of these proceedings only involves the adjudication of CID members' rights to water they receive from the Project. It does not involve independent claims for water rights that existed prior to the Project and with priority dates senior to the Project water rights. The requirements of

---

[1] The Court does not request further briefing from the United States on the requirements of the Warren Act.

the Warren Act are relevant only if CID members claim Carlsbad Project facilities as a point of diversion or place for storage for those rights.

II THE COURT'S DECISION:

Issues and controversies concerning the appropriate priority dates for storage and diversion of Project water will be determined in the Project (Offer) Phase of these proceedings. NMSA 1978, §72-4-19 provides in pertinent part:

> *Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.*

Under this statute, it is mandatory that a priority date for water rights of individual members of CID be determined. Also, under this statute, "... the specific tracts of land to which it shall be appurtenant, "shall be determined.

Issues and controversies remain as to whether Project priority dates should be

included in snbflle orders of individual members of CID or whether individual priority dates based upon when water was devoted to beneficial use or on a relation back basis must be determine. NMSA 1978, §72-4-19, and Judge Mechem's 1987 Opinion in Aamodt concerning tract by tract determinations have not been discussed by counsel other than counsel for PVACD in connection with the 1987 Opinion. Counsel are granted leave for a period of thirty (30) days after the date of service of this opinion and order to respond to the claims of PVACD that New Mexico law requires an individual tract by tract determination of priorities in these proceeding's which shall include a memorandum brief concerning the proper interpretation of NMSA 1978, §72-4-19.

The Court agrees with the arguments of the United States that NMSA 1978, § 72-10-16 and 73-10-24 concerning the pro rata distribution of water to members of C'ID are controlling; however, this does not answer the question of whether members of CID are entitled to have individual priority dates determined with the specific understanding that Project water vis a vis members of C'ID is to be distributed equitably and on a pro rata basis. (quotes from the parties are omitted; issue of waiver and relinquishment addressed in ¶111 below.]

> *The Court is of the opinion that individual priority dates should be determined based upon the date that water is devoted to beneficial use or on a relation back basis, but, with the specific understanding that the distribution of water among members of CID shall be made pro rata at all times in accordance with the provisions of NMSA 1978, ¶73-19-16 AND 73-10-2 4 with due regard to NMSA 1978, ¶72-S-28F.*

Supplemental Decision at 27-28 (emphasis added).

A. United States Objections. Comments, Suggestions and Memorandum Brief

(1) Neither NMSA 1978, §72-4-19 nor Aamodt Mandate that Members of CID be Adjudicated Individual Priority Dates

The United States agrees with the Court that issues and controversies concerning the appropriate priority dates for storage and diversion of Project water should be determined in the Project (Offer) Phase of the proceedings. The United States also agrees that water must be distributed to the CID members on a pro rata basis. The United States disagrees however that it is mandatory that the CID members

are adjudicated individual priority dates under NMSA 1978, § 72-4-19 (1907) or State ex rel. Reynolds v. Aamodt, D.N.M. No. CIV 6639-M, Memorandum Opinion and Order (Feb. 26, 1987).

Section 72-4-19 does not require that each tract have a separate priority date, there can be one priority date for all the tracts of land to which the water right is appurtenant. For Reclamation projects, the priority date decreed is for the project storage and diversion rights which are appurtenant to all the tracts of land within the district. Section 72-4-19 recognizes this distinction for Reclamation projects by the provision "except as otherwise provided in this article" which refers to the unique method of appropriation of water for Reclamation projects pursuant to NMSA 1978, § 72-5-33.[2] The United States provides notice of its

[2] According to the compilers notes to, the words in "in this article" were inserted by the compilers of the 1915 Code, and refer to Code 1915, ch. 114, art. 1, which includes among

appropriation of water for all of the lands within the Project; it is not an appropriation on a tract by tract basis where a priority date is assigned to each tract. That no individual tract by tract determinations of priority dates are required for the Carlsbad Project is also demonstrated by NMSA 1978, § 73-10-16 (1919) which provides not for an administration of tract by tract priorities by the State Engineer but for a pro rata distribution of water by CID to the CID members.

The United States previously did not address the Aamodt opinion because it simply has no application to the facts and law at issue here. As explained below, Reclamation projects, such as the Carlsbad Project, have a unique status under New Mexico law. *See, e.g.,* NMSA 1978, §§ 73-10-I through 41 (Irrigation Districts Cooperating with the United States under the Reclamation Laws). The court in Aamodt was specifically addressing community ditches where the

---

others, § 72-5-33. NMSA 1978, §§ 72-4-18 & 19 (1907).

individual irrigators that have water rights come together to form a ditch association, or acequia, to carry water to their respective lands. *See, e.g.*, NMSA 1978, §§ 73-2-1 through 64 (Ditches or Acquias). Neither the water rights for Reclamation projects nor the specific statutory authority involving Reclamation projects, were at issue in Aamodt.

The Aamodt court determined that tract by tract priorities are required for community ditch associations because the irrigator appropriators hold water rights individually. Aamodt at 23. "The ditch, or carrier system having been constructed by the joint labors of all the water users, is owned by all of them as tenants in common; each having a common interest in the same." Id., citing Snow v. Abalos 18 N.M. 681, 695, 140 P. 1044 (1914). Unlike the irrigators in Aamodt, the individual irrigators in the Carlsbad Project did not come together to form a community ditch through which the CID members carry individually owned

water rights. The CD members have no ownership in a common ditch but receive water from federally owned facilities and from the water rights purchased and appropriated by the United States for the Project. Thus, the Aamodt decision is irrelevant to Court's rulings here.

(2) New Mexico's Water Statutes Provide Specific Mechanisms for Use and Distribution of Water in a Reclamation Project and Determination of Individual Priorities is Not Warranted

The entire scheme of New Mexico water law enacted by the Territory of New Mexico, and then adopted by New Mexico when it became a state, recognizes the unique nature of Reclamation projects and role of federal law and special state statutes in the distribution of water within Reclamation projects. Unlike in acequias or community ditch associations where each irrigator has appropriated a water right from the stream system and then joins other irrigators to develop a distribution system, in a Reclamation project irrigators apply

to receive Project water from appropriations made by the United States and from federally owned Project facilities. It is the CID board, not the State Engineer pursuant to a priority date, that determines when and how water will be distributed to members of CID. Adjudication of individual water rights with individual priorities on separate tracts of land within CID is inconsistent with New Mexico law providing for the control and distribution of water within the district by the United States and CID pursuant to federal and state law.

The unique nature of Reclamation projects in New Mexico is demonstrated by NMSA 1978 § 72-9-4 (1941), which exempts federal Reclamation projects from the effect of most of the New Mexico water code. As the New Mexico Supreme Court recognized in City of Raton v. Vermejo Conservancy Dist., 678 P.2d 1170 (N.M. 1984), the New Mexico legislature has carefully and specifically distinguished the requirements for federal reclamation

projects from those of other water users. NMSA 1978, § 72-9-4 (1907) provides:

> Except as provided in Sections 15 and 22 [NMSA §§ 72-5-33 and 19-7-26] of this act nothing herein shall be construed as applying to or in any way affecting any federal reclamation project heretofore or hereafter construed pursuant to the [Reclamation Act of 1902], or acts amendatory thereof or supplementary thereto.

There is no dispute that this provision exempts the United States from having to comply with certain provisions of the water code for Reclamation projects. Section 72-9-4 exempts the United States from, for example: 1) the requirement in NMSA 1978 § 72-5-24 (1907) that the State Engineer must approve changes of purpose of use or point of diversion 2) NMSA 1978, § 72-5-28 (1907) from forfeiture of water rights for non-use; and 3) NMSA 1978 § 72-5-1 (1907) the requirement of applying for a permit from the State Engineer to appropriate the right to use water. See, City of Raton, 678 P.2d at 1174; NMSA 1978 § 19-7-26 (1907).

Thus, the United States does not have to apply to the State Engineer for approval to change the purpose of use or point of diversion of the Carlsbad Project storage and diversion rights nor does the United States have to obtain a permit from the State Engineer to appropriate water for the Carlsbad Project but instead files notice of appropriation in accordance with § 72-5-33. Further, the United States' storage and diversion rights for the Carlsbad Project are not subject to forfeiture. See ¶VI below.

Other special state statutes specifically exempt the United States from the requirement of applying for a permit from the State Engineer for the appropriation of water for Reclamation projects. See NMSA 1978, § 72-5-1 (1907). Instead, the United States is required only to file a notice of appropriation of water for the entire Project which then prohibits appropriation of that water by others. NMSA 1978, § 72-5-33 (1907). Individual irrigators within an acequia or

within the Project, however, are not exempt from NMSA 1978, § 72-5-I.[3]

The unique nature of Reclamation projects is also demonstrated by other provisions of New Mexico law. CID's Board has the discretion to decide how to distribute available water in what it determines to be in the best interests of CID's members. Brantley Farms v. Carlsbad Irrigation District, 124 N.M. 698. 705; 954 P. 2d 763, 770-771 (NM Ct. App. 1998), citing NMSA 1978, § 73-10-24 (1919). NMSA 1978, § 73-10-24 (1919) provides that the board of directors of an irrigation district has the authority to distribute water in the best interests of all of the parties involved, provided that "all water the right to the use of

---

[3] To the United States knowledge, the individual irrigators within CD have not applied for, nor been, granted any permits to appropriate water for their individual tracts of land in accordance with the mandates of this statute. Certainly this would be required as part of the proof each irrigator must submit during their subfile proceedings in order to have a water right adjudicated in accordance with New Mexico law.

which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress, and rules and regulations of the secretary of interior and provisions of such contract in relation thereto." Pursuant to NMSA 1978, §73-10-16 (1919), the board of directors of an irrigation district cooperating with the United States must "establish equitable rules and regulations for the distribution and use of water among the owners of said land."[4]

To the extent a member of CID is allowed to have an adjudicated water right for Project water with a priority date that is senior to the right of any other CID member or to the Project storage and diversion water rights of the United States, or claims to own a water right that can be pulled out

---

[4] Article 10 of Section 73 of the New Mexico statutes solely addresses "Irrigation Districts Cooperating with the United States Under Reclamation Laws; Formation and Management", such as CID. NMSA 1978, §§ 73-10-1 -73-10-31 (1919).

of the Carlsbad Project water supply,[5] the ability of the United States and CID to deliver water to all of the lands in CID is threatened. Thus, New Mexico law recognizes that water rights are appropriated for Reclamation projects differently than by individual irrigators and that water is not distributed to the irrigators in accordance with a priority date as would be done if they were the actual appropriators of the water rights.

If the Court ultimately determines that a priority date should be determined for each CID member, then the priority dates for all the members must be the same as the Project based upon relation back. The relation back principle holds that the priority date of a completed project water right will

---

[5] The Tracys/Eddys argue that they need a priority date so they can transfer water out of the Project. Federal law does not provide for the permanent transfer of water outside of the Project acreage as the Tracys/Eddys and the Brantleys are contemplating. Water in the Carlsbad Project must remain appurtenant to the Project acreage and adjudication of a priority to the individual irrigators would serve no purpose.

relate back to the date when work on the diversions or other project works began so long as the work has been pursued with due diligence.[6] United States v. Hope Community Ditch, No. 712, Equity (D.N.M. May 8, 1933) ("Hope Decree"), Special Master's Specific Findings of Fact and Conclusions of Law, June 4, 1932 ("Special Master's Report") at 581; U.S. Statement of Claims, Ex. 1.

The relation back doctrine applies to the Carlsbad Project in the following manner. The construction of the works for storage and diversion began in 1887 with the construction of Avalon and McMillan dams and the canals necessary to deliver water to the lands of the Carlsbad Project. U.S. Statement of Claims, Ex. 1 at 562. These

---

[6] Thus, if, for example, work begins on a diversion dam in 1920 and work steadily progresses upon the construction of a canal and then continues upon the construction of feeder ditches until water is finally applied to the land in 1945, the water right for the project will relate back to 1920 when the work began.

Project facilities and associated water rights were purchased by the United States in 1905. U.S. Statement of Claims, Ex. 5. New appropriations were also made by the United States through withdrawal notices issued to the New Mexico Territorial Engineer in 1906. U.S. Statement of Claims, Ex. 7. There is no question that the work was carried on with due diligence to bring water to all 25,055 Project acres. U.S. Statement of Claims, Ex. 1 at 581. Thus, any water rights adjudicated to CID members would have the priority date of the Project based upon relation back. Id.; State ex rel. Reynolds v. Mendenhall 68 N.M. 467, 362 P.2d 998 (1961). That is the reason all lands within a single Reclamation project have, by state and federal law, only a right to a *pro rata* share.

III. THE COURT'S DECISION

> *Authorities in support of the respective contentions of the parties as to the relinquishment or waiver have not been submitted to the Court. All parties are*

granted leave to submit a memorandum brief concerning the issues of relinquishment or waiver within thirty (30) days after the date of service of this opinion and order.

Supplemental Decision at 28-29.

A. United States' Memorandum Brief:

The Tracys and Eddys and the Brantleys claim in this membership phase of the proceedings that they have water rights with priority dates that are senior to the Carlsbad Project storage and diversion priorities. These claims are not properly before the Court because the water rights claims being adjudicated here are claims to Project water,, water that CID receives from the water rights purchased and appropriated by the United States and that CID distributes to the CID members pursuant to state and federal law. Any water rights that the irrigators had prior to the United States purchase of the Pecos Irrigation Company land, facilities, and water rights and prior to the United States appropriation

of water pursuant to NMSA 1978, § 72-5-33 (1907), were relinquished if the irrigator wanted to receive Project water. As is demonstrated in CID's response to the Court's December 19, 2001, Supplemental Decision, and as demonstrated below, the irrigators gave up any preexisting individual water rights they may have had to receive water from the Project storage and diversion facilities.

In December of 1905, the United States and the Pecos Irrigation Company entered into a written contract whereby the Pecos Irrigation Company agreed to sell and convey to the United States all of the water rights owned or claimed by it, all of its irrigation system in Eddy County, New Mexico, together with all of its reservoirs, laterals, head-gates and other irrigation facilities. To be excepted from the conveyance were "all water rights for which contracts had theretofore been made by the Pecos Irrigation Company which had theretofore been placed of record, whether such

contracts were then held in the name of the Pecos Irrigation Company or by other parties."[7] U.S. Statement of Claims, Ex. I at 574. By Warranty Deed, dated December 18, 1905, the Pecos Irrigation Company conveyed fee simple title to the United States the land, irrigation facilities, and water rights agreed to in the 1905 Agreement Id. at 575, 576. The conditions under which the United States would take over the Pecos Irrigation Company property, facilities, and water rights were set forth in a March 19, 1906 Agreement between

---

[7] The Tracys and Brantleys have argued that they have water rights that vested prior to 1905 which were not conveyed to the United States by Warranty Deed from the Pecos Irrigation Company. The United States and CID do not believe there are any such vested rights that were not conveyed to the United States. Neither the Tracys nor the Brantleys have identified any contracts for water rights that were excepted in the conveyance of water rights to the United States by the Pecos Irrigation Company. See CID Brief on Legal Issue No. 3, at 50-64; November 3, 1997, Opinion on Threshold Legal Issue No. 3 at 4. Regardless, the existence or ownership of any preexisting vested rights that did not become part of the Project water rights are not at issue in these proceedings.

the Pecos Water Users Association and the Secretary of the Interior. U.S. Statement of Claims, Ex. 9. The Agreement provided, inter alia, (1) that only those who are or who may become members of the Association shall be accepted as applicants to the Secretary of the Interior for the right to receive Project water to be made available by the irrigation works purchased, repaired and constructed by the United States for the Project and (2) that the aggregate amount of such rights shall not exceed the number of acres capable of irrigation (paras. 2 & 3). The stock subscriptions for shares of stock in the Pecos Water Users Association and applications made to the Secretary of the Interior for a "water right" determined the right of the individual farmers to receive Carlsbad Project water.[8]

To subscribe to shares of stock in the Pecos Water

---

[8] CID will address this in more detail in their comments and brief in response to the Court's December 19, 2001, Decision and Order.

Users Association, an irrigator had to become a member of the Association and be subject to its bylaws and Articles of Incorporation. CID Brief on Legal Issue No. 3, Ex. 9, Art. V, Sections 3, 4 & 5. Section 3 provides:

> As a condition of continued ownership of said shares of stock and participation in any of the benefits thereof, each subscriber therefor, or his transferee in pursuance of these Articles shall promptly make application for a water right to the proper authorities of the United States for the lands represented by his shares, and duly proceed to the perfection thereof, in full compliance with the law applicable thereto and the rules and regulations established in pursuance thereof, as soon as official announcement shall be made that water for such lands is available from the works constructed, owned or controlled by the United States.

"Water Right" applications which the individual farmers submitted to the Secretary of the Interior were not applications for water rights under territorial or state law but were for a right to receive water from the Carlsbad Project water supply pursuant to the Reclamation Act. The applications covered all of the applicant's water supply such

as the application of Francis Tracy which requests from the Secretary deliveries of 3 acre feet per acre of land, the duty of water for that land. Application of Francis Tracy, U.S. Statement of Claim, Ex. 10.

The applications provided that applicants could lose their right to get Project water. "Upon failure of the applicant to comply with the terms of said Reclamation Act and the regulations thereunder, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon." Id. The applications also provided that only those qualified under the provisions of the Reclamation Act could apply for or hold a water right from the Secretary of the Interior and that these water rights could only be used upon 160 acres of land. Id. As also provided in the applications, the irrigators were to pay certain construction and operation and maintenance charges for the

right to receive the water, which charges were to be a lien against the lands of the irrigator. Id.[9]

During the course of the operation of the Pecos Water Users Association, the method of collecting the charges and assessments against individual farmers proved to be unsatisfactory. In 1919, the New Mexico State legislature created the irrigation district which was a new type of entity which could collect its assessments by taxation levied against all the lands within the district. See NMSA 1978 §§ 73-9-1, 73-11-4, 73-10-45. Any such irrigation district could become the successor "to all the rights, assets, privileges, and

---

[9] The right to receive Project water did not attach to the land until after all payments were made. See, e.g., 43 U.S.C. §§ 392, 431(1986). In 1912, Congress authorized the issuance of "water- right" certificates to the farmers upon final payment of all sums due the United States. 43 U.S.C. § 541 (1986). No such certificates were issued for the Carlsbad Project as the irrigators never completed their payments due United States. Congress dispensed with the issuance of water right certificates all together in 1922 and with the filing of liens against the farmers lands to ensure repayment. See 43 U.S.C. §§ 511, 512 (1986).

immunities, and assume all of the obligations, duties and liabilities of any water users' association... by conveyance and simple contract . . . " NMSA 1978, § 73-10-45 (1921). In 1922, Congress authorized the Secretary of Interior to enter into contract with any legally organized irrigation district whereby such irrigation district agreed to pay the moneys required to be paid the United States. 43 U.S.C. § 511(1986).

Thus, in 1932, the United States entered into a contract with the Carlsbad Irrigation District and the Pecos Waters' Association. U.S. Statement of Claims, Ex. 14. In the 1932 Contract, the water right applications of the individual water users were modified to reflect the fact that the major contractual obligation would now be between the newly created CID instead of the individual water users. Further, CID replaced the Pecos Water Users Association and the United States agreed to deliver to CID the water supply from the Carlsbad Project under certain conditions

and limitations, the amount of the repayment of the construction costs of the Project was reduced, and CID, rather than the water users, was obligated to pay off all reimbursable project costs. Id.

In summary, the irrigators in the Carlsbad Project obtained water from the United States' Carlsbad Project, not because of any individual preexisting water right they may have had, but because they obtained shares of stock in the Pecos Water Users Association and applied to the Secretary of the Interior for the right to receive Project water. The 1932 Contract with CID affirms that the water being delivered now to the CID members is that same water, water purchased and appropriated by the United States for the Project, not appropriated by individual CID members prior to the Project.

VI. THE COURT'S DECISION

> *At the request of the State, the Court modified its previous ruling that "the right to use water of the United States may not be lost through laches or*

neglect of its officers or employees. "October 19, 2001, Decision at 12. The Court added to its ruling the following "The Court determines that the amount of water that the United States may divert and store and that CID may distribute in connection with the Carlsbad Project will be based upon the amount necessary to serve the adjudicated rights of CID 's individual members.

Supplemental Decision at 30.

A. <u>United States Objections, Comments, Suggestions:</u>

The United States believes the Court's previous ruling is correct and should not be modified as the State requested. The State's proposed modification suggests that the State wants the Court to rule prematurely on the quantification of the storage and diversion rights and that the acreage appurtenant to the Project may be something less that 25,055, despite the fact that 25,055 Project acres have been historically irrigated. The United States requests that the Court strike its adoption of the State's requested modification and substitute the following: "The Court determines that the

Project storage and diversion rights of the United States cannot be forfeited or abandoned and that the amount of water that the United States may divert and store and that CID may distribute in connection with the Carlsbad Project will be determined in the Project Offer phase of the proceedings."[10]

The State argues that because the United States does not have a property right in the water rights owned by the individual members of CID, the United States storage and diversion rights may be lost by forfeiture and abandonment. While the Court has declined to call the United States storage and diversion rights "water rights", the Court has also indicated that the difference is an exercise in semantics and form, rather than one of true meaning and significance. In

---

[10] In the January 7, 2002, Decision and Order at page 46, the Court confirms that the storage and diversion rights of the United States in connection with Project water cannot be forfeited or abandoned.

any event, whether or not these rights are water rights, they are property rights and the United States cannot lose its property through forfeiture or abandonment,e.g. by laches or neglect of its officers or employees. See, e.g., United States v. Ballard 184 F. Supp. 1, 12 (D.N.M. 1960). Only Congress can dispose of federal property. United States Constitution, art. IV., §3, cl. 2. Moreover, NMSA 1978, § 72-9-4 (1941) exempts Reclamation Project storage and diversion rights from the forfeiture provisions of the water code, NMSA 1978, § 72-5-28 (1907) and the forfeiture statute itself exempts waters stored in reservoirs, NMSA 1978 § 72-5-28(A) (1907).

Further, the State's requested modification goes beyond the issue that was being addressed by the Court at this stage of the proceedings. The December 19, 2001, Supplemental Decision addresses the CID members' rights in the membership phase 9f the proceedings. The Court has

informed the parties that the quantification of the Project storage and diversion rights, and the determination of the amount of acreage appurtenant to the Project storage and diversion rights will be determined in the Offer Phase of the Project adjudication.

VI. THE COURT'S DECISION

> *What happens to a member's water rights if they are forfeited appears to raise a new issue to which other parties have not had an opportunity to respond. The issue will be determined based upon the submission of memorandum briefs which shall be submitted to the Court within thirty (30) days after the date of service of this Supplemental Decision and Order.*

Supplemental Decision at 36.

A. United States' Memorandum Brief:

If an individual irrigator does not put his *pro rata* allocation of Project water to beneficial use, or fails to comply with Reclamation law, his right may be forfeited or lost to him but it is not lost to the detriment of the Project. New Mexico law makes it clear that the water remains within

the Project for use by other irrigators. New Mexico statutes allow CID to transfer the right to receive water from one farm to another without the involvement of the New Mexico State Engineer. NMSA 1978, § 72-9-4 (1941) exempts the Carlsbad Project from both NMSA 1978, § 72-5-23 (1907), which would otherwise require state engineer approval to transfer a water right. Moreover, the New Mexico statutes specifically allow CID to approve the transfer of the use of Project water to any other lands in the district, so long as the requirements of state and federal law and the Reclamation contracts are met. NMSA 1978, §§ 73-10-16 (1919); 73-13-4 (1925)."[11]

Reclamation law requires the same result. *See, e.g.* 43 U.S.C. § 492. The storage and diversion water rights in the

---

[11] CID uses assessment rolls to track the acres within the Project which are eligible to receive water from CID. Although CID may suspend one parcel's right to receive water and transfer it to another parcel, the total number of acres receiving water always remains 25,055.

Carlsbad Project are appurtenant to the entire project acreage rather than individual tracts of land. See State, Dep't of Ecology v. Acquavella 935 P.2d 595, 602-03 (Wash. 1997). "[Ulse of water for the Yakima Project is made under one federal appropriation with one priority date[;]" water not used by the irrigation district remains with the project and can be used for other project purposes. Department of Ecology v. Acquavella, Report of the Court on Remand Re: Yakima-Tieton Irrigation District (Sept. 2, 1999) at 40-46 (emphasis in original), U.S. Response to Matters, Ex. 1. Thus, the Project storage and diversion rights can be used upon any of the 25,055 acres within the Project so when an individual's water right is forfeited it can be used on any of the Project acreage.

The reversion of a forfeited irrigator's water right to the Project for use on any of the Project lands encourages the beneficial use of water and gives effect to state law providing

for distribution and transfer of water within the Project.

Moreover, it helps ensure the viability of the Project over the long-term.

DATED this 18th day of January, 2002.

Respectfully submitted,

s/_____

LYNN A. JOHNSON Esq.
DAVID W. GEHLE T, Esq.
U.S. Department of Justice, ENRD
999 18th Street, Ste. 945
Denver, CO 80202
(303) 312-7315

Attorneys for the United States of America

Of Counsel:

CHRISTOPHER RICH, Esq.
Office of the Regional Solicitor
U.S. Department of Interior

FIFTH JUDICIAL DISTRICT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel. State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT,	)	Nos. 20294 and 22600 Consolidated
Plaintiffs,	)	
vs.	)	
L.T. LEWIS, et al., UNITED STATES OF AMERICA,	)	Hon. Harl D. Byrd District Judge *Pro Tempore* Carlsbad Irrigation District Section
Defendants,	)	Membership Phase
and	)	
STATE OF NEW MEXICO, ex rel, State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT,	)	
Plaintiffs,	)	
vs.	)	
HAGERMAN CANAL CO., et al.,	)	
Defendants.	)	

SUPPLEMENTAL DECISION AND ORDER

This Supplemental Decision and Order Addresses the Comments, Suggestions, Objections and Memorandum Briefs of Counsel for the Parties Set Forth in Their Respective Responses to the Court's October 19, 2001 Decision and Order Concerning the Water Rights Claims of Members of CID.

THIS MATTER comes on for consideration by the Court in connection with the submissions of counsel for the parties in response to the requests of the Court set forth in numbered paragraphs 2 and 3, pp. 19 and 20 of the Court's Decision and Order served on October 19, 2001 (Court's Decision). The requests are summarized as follows:

1. Counsel for the State was requested to advise the Court as to whether all counsel and other interested parties had conferred and agreed upon the proper approach to be used in order to quantify consumptive use and the approach agreed upon, or, if an approach had not been agreed upon, to advise the Court of all remaining issues and

controversies in connection therewith. Court's Decision, p. 19.

2. All counsel were requested to submit comments, suggestions and objections, if any, as to the form or content of the Court's Decision " and memorandum briefs addressing the issues set forth under the heading **PRIORITY DATES**, at pages 16-17," of the Court's Decision. Court's Decision pp. 19 and 20.

The Court has reviewed the following:

1. Counsel for the State's letter to all other counsel and parties appearing *pro se* concerning methodology dated July 24, 2001.

2. Counsel for the Pecos Valley Artesian Conservancy District's (PVACD) letter to counsel for the State dated July 30, 2001.

3. Letter report dated November 6, 2001 from Pierre Levi, one of the attorneys for the State, regarding

"technical discussions".

4. Counsel for the State's memorandum dated November 9, 2001 captioned RE: *LEWIS* ADJUDICATION - CARLSBAD IRRIGATION DISTRICT SECTION METHODOLOGY FOR QUANTIFYING CONSUMPTIVE USE (State's Memorandum).

5. The UNITED STATES' COMMENTS, SUGGESTIONS, AND OBJECTIONS TO THE COURT'S OCTOBER 19, 2001, DECISION AND BRIEF ON PRIORITY DATES (United States' Comments) served on November 16, 2001.

4. TRACY/EDDYS' MEMORANDUM ON WATER RIGHTS PRIORITY DATES (Tracy/Eddys Memorandum) served on November 16, 2001.

5. Letter dated November 19, 2001 from W.T. Martin, Jr., attorney for the Brantleys and Dick A. Blenden, attorney for the Tracy/Eddys regarding issues concerning

Project Offer, upon whom it is binding and comments concerning the use of the Blaney-Criddle approach to quantification of water rights.

6. The BRANTLEYS' RESPONSE AND COMMENTS TO THE COURT'S OCTOBER 19, 2001 DECISION AND ORDER (Brantley's Comments) served on November 19, 2001.

7. The United States' and CID's Response to Court's Decision and Order of October 19, 2001 Regarding The Status of Discussions on Methodology of Quantifying Consumptive Use in Connection With The Membership Phase and The Project Offer Phase (United States' and CID's Response) served on November 20, 2001.

8. Defendant Carlsbad Irrigation District's Comments, Suggestions, and Objections to Court's October 19, 2000 (sic) Decision and Order and Brief on Priority Date Issue (CID's Comments) served on November 20, 2001.

9. The STATE OF NEW MEXICO'S RESPONSE TO THE COURT'S OCTOBER 19, 2001 DECISION AND ORDER (State's Response) served on November 20, 2001.

10. PVACD's COMMENTS ON N.M. STAT. ANN. §72-9-4 (PVACD's Comments) filed November 20, 2001.

11. PVACD'S BRIEF ON MEMBER PRIORITY DATES (PVACD'S Brief) filed on November 20, 2001.

12. NEW MEXICO STATE UNIVERSITY'S COMMENTS, SUGGESTIONS AND OBJECTIONS TO THE COURT'S OCTOBER 19, 2001 DECISION AND ORDER (NMSU'S Comments) served on November 21, 2001.

INTRODUCTION

Nothing contained in the Court's Decision shall be deemed or construed as a determination of any claim,

contention or assertion of any party not specifically set forth herein under the designated portions captioned "Court's Decision" or "Court's Decision and Order".

Matters not specifically decided herein have not been determined because they are inconsistent with specific determinations of the Court or they are not well founded or determinations in connection therewith are not required at this time in order to dispose of the matters presently pending before the Court.

COURT'S DECISIONS AND ORDERS

I. ISSUES AND CONTROVERSIES PERTAINING TO PROPER APPROACH TO QUANTIFYING CONSUMPTIVE IRRIGATION REQUIREMENT, FARM DELIVERY AND PROJECT DIVERSION REQUIREMENTS

Counsel for the State Responded in Pertinent Part:

> Counsel for the CID, the United States, PVACD, the Brantleys, the State, as well as representatives of the Tracy and Eddy interest, conferred about these matters on

November 15, 2001. Counsel and the interested parties did not agree on the methodology to be used in quantifying the consumptive irrigation requirement and the off-farm efficiencies in the 9 (sic)connection with the Membership Phase and the Project (Offer) Phase.

Counsel for the CID, the United States, PVACD, and the State agreed that determinations with regard to the consumptive irrigation requirement and the off-farm efficiencies should be reserved for the Project (Offer) Phase of these proceedings. After the Court has issued its final order disposing of the issues set forth in its March 20, 2001 Decision and Order, counsel for the CID, the United States, PVACD and the State propose that committee counsel develop a list of the remaining issues to be determined by the Court in the Project (Offer) Phase and a tentative scheduling order for the Court to consider in establishing a schedule to resolve the remaining issues.

Counsel for the CID and the United States will submit a separate filing regarding the figures used for the consumptive irrigation requirement and the off-farm efficiencies, and the methodology to be used in calculating such figures. Counsel for the PVACD stated that the PVACD does not want to be precluded from presenting evidence about

actual historical use when considering the consumptive irrigation requirement and the off-farm efficiencies. Counsel for the Brantleys and representatives of the Tracy and Eddy interests will submit separate proposals to the Court addressing when these issues should be determined. At the time the Court may set for consider (sic) of these issues, the State will submit it (sic) own filing regarding the consumptive irrigation requirement and the off-farm efficiencies.

State's Response, pp. 4-5.

Counsel For CID Responded in Pertinent Part:

E. Issue No. 5 (Pages 12-13 of Court's Decision

It appears that the Court agrees, based upon counsels' submissions, that proper figures for CIR, FDR, Project Delivery Requirement, and Off Farm Diversion Requirement may require factual determinations and should be reserved for the Project (Offer) Phase of the proceedings. CID has submitted a separate response to this issue.

F. Issue No. 6 (Pages 13-14 of Court's Decision)

The Court in this section of its

Decision agrees with CID's and the United States' responses that there is no need for making determinations of Off-Farm Conveyance Efficiency, On-Farm Efficiency percentages and adjustments for Off-Farm Diversions, or Farm Delivery in connection with individual subfile determinations of CID's members. These terms are inappropriate at the farm level and, therefore, will not be made in the members' subfile orders. For clarification purposes, it appears from the Court's ruling that as to factual issues involving Diversion, Farm Delivery, and Consumptive Irrigation Requirements, these determinations will be made in the Offer Phase, not the membership phase. Once determined, these numbers will then be incorporated by reference into the members' subfile orders.

CID's Response at p. 6.

The United States and CID Jointly Responded in Pertinent Part:

2. It is the position of the United States and CID that the Project Offer agreed to by the CID, United States of America and State of New Mexico ex rel. State Engineer sets forth a CIR for the lands within the Project. This number appears as part of paragraph I(C) "Allowable annual diversion" in the Project Offer. In addition to CIR, farm delivery requirement and maximum diversion are also set

forth.

3. As part of the negotiations, justification of the numbers in the Project Offer, including the CIR, was based upon the Pecos River Compact as examined through the use of computer models involving Blaney Criddle and Blaney Criddle modified.

4. CID, the United States, and the State of New Mexico were satisfied that the numbers would be defensible when the Project Offer was subjected to objections during the *Inter Se*. After this portion of the negotiations, the State of New Mexico made the Project Offer which was accepted by the United States and CID.

5. It has always been the understanding of CID and the United States that the United States, CID, and the State of New Mexico shared the responsibility of justifying the numbers in the Project Offer (including the CIR) during the Offer Phase of these proceedings because the three parties are bound by the Project Offer.

6. Defense of the numbers used in the Project Offer would be carried out by introducing evidence to the Court in the Offer Phase. The goal of the parties bound by the Project Offer is to show the Court that the numbers are justified and reasonable. The Objectors are free to contest the evidence as they see fit.

7. The Court appears to be positioning the case in such a way that the

numbers in the Project Offer agreed to by the three parties are being thrown out and are no longer binding on the parties. The Court is entertaining comments on calculating a new CIR by all the parties and Objectors instead of allowing the three parties to defend the number agreed to in the Project Offer.

8. CID and the United States would ask that the Court clarify this matter and allow the three parties bound by the Project Offer to proceed forward with the defense of the numbers agreed to in the Project Offer, including CIR, through the introduction of evidence at the Offer Phase. The Objectors will then have their opportunity to convince the Court that the numbers are not justifiable through the introduction of their evidence. United States' and CID's Response at pp. 2-3.

Counsel for the Brantley and Tracy/Eddys's Response

In a letter dated November 19, 2001 from counsel for the Brantleys and Tracy/Eddys to the Court, counsel stated:

After counsel conferred on Thursday afternoon, the State of New Mexico began the process of drafting a letter to you regarding the results of that telephone conference and the position of various parties. Because of an issue or issues that arose, the Brantleys, together with the Tracys and Eddys, were not

able to present their position at that time. The other attorneys were advised that the Tracys, Eddys and Brantleys need to discuss the issue and arrive at their own independent conclusions as to what should be their response. As a result, the State's letter will indicate that you are to receive a separate written comment or response from the Tracy-Eddy group as well as the Brantleys regarding the issue of the Project Offer and upon whom it is binding as well as Blaney Criddle. That discussion has now occurred. The Tracy-Eddy group as well as the Brantleys jointly take the following position:

1. There is no necessity to consider the Blaney Criddle approach or formula.

2. The Stipulated Offer of Judgment as written calls for and incorporates a diversion of 4.97 acre feet, a farm delivery at 3.69 acre feet, and a consumptive irrigation requirement of 2.218 acre feet. As a result of over five (5) years of negotiation, this is the amount of water that the United States, the State of New Mexico and the CID have agreed to accept in the project offer and have signed off on.

With these particular amounts,
it is not necessary to use the
Blaney Criddle approach.

In the Brantleys' Response counsel submit that no evidentiary hearing is necessary on the quantification of consumptive use. Brantley's Response at p. 5.

COURT'S DECISIONS AND ORDERS

The proposed procedures concerning the determination of all matters pertaining to the quantification of consumptive irrigation requirement, project diversion, and off-farm efficiencies, farm delivery and related matters outlined by the State is approved. Committee counsel are requested to proceed as suggested.

All issues and controversies concerning all of these matters will be addressed and determined in the Project (Offer) Phase of these proceedings.

The Court does not intend to nor has it positioned "the case in such a way that the numbers in the Project Offer

agreed to by the three parties are being thrown out and are not longer binding on the parties." as claimed by the United States and CID. Nothing contained in the prior decisions and orders of the Court should be deemed or construed to prevent CID, the United States or the State from adducing evidence in defense of the numbers agreed to in the Project Offer, including, but not limited to, those pertaining to CIR, through the introduction of evidence in the Project (Offer) Phase of these proceedings. Necessarily, Objectors will also have an opportunity to rebut the evidence adduced by CID, the United States and the State.

II. ISSUES AND CONTROVERSIES RE PRIORITY DATES

The following are pertinent summaries and excerpts from the parties responses:

The United States' Response

The United States first argues that assigning a Priority

date to CID members rights is contrary to state and federal law. In support of its contention, the United States refers to NMSA 1978, §73-10-16 and argues that: " Pursuant to this statute, water must be distributed by CID *pro rata* to CID members at all times, not just in times of shortage...". United States' Comments at p. 3. "Thus, assigning a priority date to CID members' rights, and delivering water to them based on the seniority of those rights, would be in direct contravention of the specific requirements of § 73-10-16. The water must be distributed pro rata to the CID members." United States' Comments at p. 4.

Counsel for the United States raises a new issue under paragraph B. Carlsbad Project Facilities Cannot Divert or Store Pre-Project Rights at page 5 of the United States' Comments stating:

> The federal Reclamation program was undertaken by Congress under the authority of the Property Clause, U.S.

Const. art. IV. § 3, cl. 2 and the General Welfare Clause, U.S. Const. art. I, § 8, cl. 1. See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 88-95 (1907); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 293 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725,738 (1950). Thus, to the extent that the Bureau of Reclamation, an Executive Branch agency, has authority to engage in the Reclamation Program, it is due to a statutory delegation of authority from the Congress to the Executive. *See* id. One such statutory delegation of authority is the Reclamation Act of 1902 which authorized the construction of the Carlsbad Project. Under the Reclamation Act, Reclamation facilities were authorized to be constructed for the purpose of diverting, storing and delivering Reclamation project water to Reclamation project lands. 43 U.S.C. § 371 *et seq.*[12]

The authorization granted by Congress in the Reclamation Act of 1902 did not allow non-project water to be diverted by or stored in project facilities or to allow

---

[1] Absent Congressional authorization, no person or entity may come upon or use federal property in any way. Congress' control of federal property is essentially unlimited in this regard. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

project water to be delivered to non-project lands.

Authorization by Congress for the use of Reclamation facilities for delivery of non-project water and for the delivery of project water to non-project lands was not given until the passage of the Warren Act in 1911. Act of February 21,1911, ch. 141, 36 Stat. 925; *J. B. Bean v. United States*, 163 F. Supp. 838, 841 (Ct. Cl. 1958) (The Secretary of the Interior was authorized to contract under the Warren Act to deliver to non-project lands only such water as in excess of the needs of the project lands.); see also *United States v. Tilley*, 124 F. 2d 850, 853 (8th Cir. 1941). Thus, even if individuals had owned water rights in 1905 when the Carlsbad Project was authorized and those water rights were not waived or relinquished as discussed below, it was illegal for Reclamation to undertake the storage or delivery of any those privately owned water rights. See October 19, 2001 Decision at 17. Consequently, only the water rights owned by the United States were stored in the Carlsbad Project reservoirs or diverted into the Carlsbad Project canals and were distributed to irrigators within the Project.

In order to have private water

rights stored or diverted under the Warren Act, (1) the Secretary of the Interior must determine that the Reclamation project has excess capacity and (2) the water right holder must enter into a contract with the Secretary of the Interior for the diversion, storage or delivery of the water rights through the federally owned facilities. 43 U.S.C. §§ 523,524, 525.[13]

None of the objectors have such a contract. Thus, they cannot claim to have a water right that has been, or is, delivered through Project facilities. Any pre-project rights claimed by CID members could not have been diverted, stored or delivered to them since the authorization of the Project in 1905.

C. There Can Be No CID Member Water Rights in the Project Senior to the Storage

---

[2] A Warren Act Contract was executed on August 15, 1921 between the United States and the owners of the Willow Lake Reservoir. This contract was terminated and a new contract between the United States, CID and the owners was executed on March 29, 1935. The 1935 contract was replaced with a new contract on July 2, 1951, but was terminated later. The July 2, 1951 Warren Act Contract which provides for the delivery of non- project water through project canals is attached as Exhibit A herein. See Ex. A. ¶¶ 10, 16, 20.

and Diversion Rights of the United States

If the Brantleys, or any other CID member, want to assert a claim in this case to a water right to waters of the Pecos River basin independent from, and senior to, the Carlsbad Project, they are certainly entitled to do so. The validity of the claim would be determined as any other claim; there would be subfile proceedings with the State and any water right determined in a subfile order would be subject to *inter se* challenge by all other water right claimants. As the Court acknowledged however, it is difficult to perceive that a CID member could hold a water right with a priority date prior to the priority date of the Project storage and diversion rights set forth in the Stipulated Offer of Judgment. October 19, 2001, Decision at 17.

Under the authority of the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq*., the United States purchased water rights and appropriated the waters of the Pecos River for the Carlsbad Project. *See* 43 U.S.C. §§ 383,421. In a December 18, 1905 Warranty Deed, the Pecos Irrigation Company conveyed to the United States fee simple title to certain parcels of land and real estate, the irrigation system together with all water rights owned or claimed by the Company, and all its laterals, feeders, flumes, headgates, sluiceways,

reservoirs, etc. U.S. Statement of Claims,[14]

Ex. 1. Excepted from the conveyance were the "certain canal system, water rights and works in connection therewith heretofore owned by the Haggerman Irrigation and Land Company and...all water rights for which contracts have been made by this Company and which have been placed of record ...."*Id.* However, as noted in the Court's November 3, 1997, Opinion re Threshold Legal Issue No. 3, p. 5 n. 5, contracts for water rights which were excepted from the conveyance to the United States have not been identified by any party. Thus all the water rights owned or claimed by the Pecos Irrigation Co. were conveyed to the United States.

Because the water rights purchased by the United States for the Carlsbad Project were insufficient, on January 23, 1906, the United States filed notice with the Territory of New Mexico of its reservation of waters of the Pecos River for the Project pursuant to the 1905 territorial laws of New Mexico. Section 22 of chapter 102 of the laws enacted in 1905 by the 36th Legislative Assembly of the Territory of New Mexico, which provided that

---

[3] The United States Statement of Claims, Rights, Duties, and Obligations With Respect to the Diversion, Storage and Distribution of Water in Connection with the Carlsbad Project.

the waters described by the notice were not subject to further appropriation until released by a proper officer of the United States in writing. U.S. Statement of Claims, Ex. 7. These water rights appropriated by the United States for the Carlsbad Project have not been released. Therefore, these water rights are still owned by the United States and are delivered to Project lands under the terms set by the United States and state law. *See Bean*, 163 F. Supp. at 841.

In 1906, the Pecos Water Users Association ("PWUA") and the United States entered into a contract which required that any right to the use of water from the Project be "defined, determined, and enjoyed in accordance with the provisions of [the Reclamation Act]..." U.S. Statement of Claims, Ex. 9, Art. 10. Project irrigators had to join the PWUA where they received shares of stock, the certificates for which incorporated the Amended Articles of Incorporation of the PWUA. U.S. Statement of Claims, Ex. 3. Before the shareholders in PWUA were entitled to receive Project water, they had to apply to the Secretary of the Interior for a 'water right' at the rate of one acre for each share. *Id.* at ¶ 12. The 'water right' applications formed a contract between the United States and the irrigator where the irrigator received Project water under certain conditions specified in the contract and

Reclamation law.

> Those individual contracts no longer govern distribution of water on the Project because, in 1932, a contract between the PWUA. the United States, and CID dissolved the PWUA and replaced it with CID. Membership in CID required the termination of any entitlements to shares in the PWUA. *See* U.S. Statement of Claims at 3-14. Through the 1932 Contract, CID took over the payment obligations of the individual irrigators and the Secretary released the liens on the individual farms.[15]

See *id.* at 11. However, before CID would agree to take over any irrigator's indebtedness to the Secretary, the irrigator had to surrender his contract with the Secretary. *Id.* at 12 n. 18. All the contracts were surrendered. If the

---

15

4 In order to have the application to the Secretary for a *pro rata* share of water granted, each farmer had to agree to repay their *pro rata* share of the 39 Carlsbad Project construction costs. See 43 U.S.C. § 461. In order to secure this repayment, Reclamation filed liens on the farms until such time as their share of the costs were repaid. However, during the Great Depression of the 1930's, it became very difficult for many of the farmers to make their payments. Consequently, in a 1932 Reclamation entered into a contract with the newly created Carlsbad Irrigation District in which the district agreed to take over the repayment of the Project construction costs.

contracts had not been surrendered, the district would have had to repay the construction costs but the farmers would get the water for free. Thus the Project's farmers moved from receiving water directly from the United States to receiving water from CID, which distributed the water on behalf of the United States in accordance with state and federal law. United States' Comments at pp. 7-10.

Court's Decision

Other parties have not specifically responded to the arguments of the United States that in order to have private water rights independently of those afforded through the diversion and storage of Project water members of CID would have to have an independent contract under the Warren Act. Counsel and interested parties are granted leave to respond. Responses shall be filed within thirty (30) days after the date of service of this decision and order.

CID's Response

In CID's Response counsel states:

II. Memorandum Brief on priority Dates Issue (Pages 16-18 of Court's Decision)

It was and remains CID's position that there is no need to determine individual priority dates or put priority dates in members' individual subfile orders because the members never appropriated or diverted the Project water and are not entitled to make priority calls. In situations other than within Reclamation Projects, priority dates are used in times of shortage to give senior water right holders a right to receive their water supply even if the result is to cut off junior users. The language in Section 72-10-16 requires CID to deliver to each of its members a pro rata portion of the Project water each year, regardless how much water is available. When there is a shortage situation, each member shares in the shortage. Priority dates make no difference. It would be a practicable impossibility to have different priority dates for members within the Project. It would also be a violation of the District's duties and responsibilities under the statute to provide each member with a pro rata share of whatever supply of water is available in a given year. If the Court feels it necessary to include a priority date in the members' subfile orders, then the individual subfiles should incorporate the priority dates found in the Project Offer.

The federal district court in Hope addressed this issue and applied the relation

back doctrine to give the same priority dates to all 25,055 acres. Conclusion of Law II states:

> That as each of the Plaintiff's present respective purchased water right was initiated, the construction which that right was intended to be exercised by Plaintiff's predecessor in right, title and interest therein and thereto, was carried forward and completed with due diligence; and waters of the Pecos River, intended to be diverted and actually diverted under such right and through such irrigation system, were applied to a beneficial use in the irrigation of lands within a reasonable time after each right was initiated.

The Hope court then went on to find the priority dates that were applicable to the Project as a whole. See Final Decree, Paragraphs II, III, IV, and VI. These priority dates as set forth in the final Hope Decree are the dates that appear in the Project Offer and are the dates that apply to all of CID's members equally, regardless where their lands may lie within the District.

At the time the Pecos Irrigation Company bought out the Pecos Irrigation and Improvement Company in 1900, the predecessor company had entered into water contracts hoping to some day provide water to 62,000 acres. See Littlefield, at 79, 81-83. It is

these paper "water rights" upon which the Tracys and Brantleys claim to own pre-existing, pre-Project water rights and presumably to which the Brantleys now claim separate or "individual" priority dates.

The members of the newly organized Pecos Water Users Association were the farmers who in the early 1900's had signed up or were actually receiving water from the predecessor private ditch company. They met in November, 1904 and passed a resolution asking the Reclamation Service for its immediate assistance in reconstructing the Pecos Irrigation Company's system. See, e.g., Littlefield, at 122; Hufstetler, at 69-70. [Tracys Ex. 8] The water users emphasized their situation was an emergency demanding immediate attention. See Hufstetler, at 70, 84. In forming the Pecos Water Users Association and subsequently entering into a contract with the federal government in 1906, the farmer members agreed in their reclamation contract and stock subscriptions that once the system was repaired, they would receive water from the Carlsbad Project's water supply. [CID Ex. 9] These landowners in subscribing to the water users association agreed that when the time was appropriate they would execute new contracts (water right applications) with the government to receive water from the Carlsbad Project's water supply. See Littlefield, at 117.

Beginning in 1911, the government began demanding that Project farmers comply with reclamation law and their Pecos Water Users Association stock subscriptions by filing applications to receive Project water. Id. at 201. [CID Ex. 9] With the expansion of the Project during the next ten years which added Units II and III, the Carlsbad Project's irrigable acreage was increased to 25,055 acres, at which it remains today. See Littlefield, at 249. By the time Carlsbad Irrigation District was formed in 1932, all of the Project's 25,055 irrigable acres were covered by individual applications for water by the landowners, who in turn were required to subscribe to stock and become a member of the Pecos Water Users Association. [PVACD Ex. 14, at ¶12; Ex. 16, at ¶2; Tracys Ex. 8 at ¶11; Ex. 9 at ¶8]

In subscribing to the Pecos Water Users Association, the Brantleys' and Tracys' predecessors in interest agreed to make application to the United States to receive Project water for the lands identified in their water users stock subscriptions "as soon as official announcement shall be made that water for such lands is available from the works constructed, owned or controlled by the United States". [Id. at 26, Art. V, § 3] By becoming a member of the Pecos Water Users Association, each share of stock subscribed entitled the shareholder to "a right to have water delivered to the owner thereof by the Association, for the

irrigation of lands to which such share is appurtenant". [Id., Art. V, § 6] The stock subscription agreement provided that the water received was appurtenant to the land described and would pass to a new owner if the land were sold. [Id., Art. V, §§ 10-11] It also provided, and the landowner agreed, that should it at any time "become impracticable to beneficially use water for the irrigation of the land to which the right to the use of the water is appurtenant, the said right may be severed from said land and simultaneously transferred and attached to other lands ...." Id., Art. V, § 9]

According to the Brantleys' Exhibit 19, five separate water right applications were subsequently filed with Defendant United States in 1911-12 by various individuals owning certain lands now owned by the Brantleys. In the water right applications filed by the Brantleys' predecessors in interest, the landowners in so signing up for Carlsbad Project water in 1911-12 agreed that the water to be delivery would be three-acre feet per acre of irrigable land, or a proportionate share per acre from the water supply actually available for the lands under the Project. [Tracys Ex. 19, at 57] The landowners within the Project's boundaries, in signing these applications with Defendant United States, also agreed the contract was subject to cancellation and forfeiture if the lands were ever transferred to parties not qualified to obtain Project water

under the Reclamation Act, if the lands as to individual holdings exceeded 160 acres, and for non-payment of assessments. [Id., at 57-58]

From the government's point of view, it had no interest in purchasing the predecessor company's old contracts with private landowners. To do so would have obligated the United States, as a successor in interest to the contracts, to provide water to all these lands, which the government had no intention of doing.

> [T]hese alleged water rights were for the most part nothing more than an inchoate right, or what could be called even that, used merely for proving up under the desert land laws... Most of the desert land entries thus were in reality made for the benefit of the Company, so that the hardship, if any, fails where it properly belongs, upon the Company. In those cases where entries were made in good faith, all inceptive rights were lost by abandonment long prior to the purchase of the system by the United States

Littlefield, at 232 (Reclamation Director Newell - 2/8/1912).

The holders of these unfulfilled contracts, if they ever wished to receive Project water, were

required to join the Pecos Water Users Association and to agree by signing such stock subscriptions to pledge their lands and subordinate whatever claims to water they believed they owned in exchange for receiving a water supply from the government's reclamation project -- the only game in town. In order for the government to begin work on the Carlsbad Project, the farmers and landowners had to satisfy the above contractual procedures required by the Reclamation Service. See Littlefield, at 148-49.

Although the federal government tried to bring as many cultivated lands as possible into the Carlsbad Project which may at one time have received water, the United States never formally recognized any such pre-existing water rights, requiring all Carlsbad farmers to file new water right applications before they could receive any Project water from the government. See Littlefield, at 268. In their March 19, 1906 agreement, the United States and the Pecos Water Users Association acknowledged that the Association's shareholders were required "to initiate rights to the use of water from the proposed irrigation works to be constructed by the Secretary of Interior..." [CID Ex. 3, at 983] The government, in turn, agreed that only those who were shareholders in the Pecos Water Users Association would be accepted as applicants for rights to use Project water. [Id. at 985, No. 2]

The Tracys and Brantleys in their abstract exhibits submitted with their briefs on Threshold Legal Issues Nos. 3 and 4 provided numerous documents showing that their predecessors agreed to and complied with the government's conditions to receive water from the Carlsbad Project. They subscribed to stock in the Pecos Water Users Association. [Tracys Ex. 19, at 26-31; Ex. 21, Abstract #96,198, at 225; Abstract #96,285, at 45; Abstract #96,283, at 16, 23; Abstract #23,994, at 9; Abstract #96,180, at 39, 85, 96, 145; Abstract #96,205, at 24, 28, 3 l, 34, 177; Abstract #4821, at 48, 49, 65] They submitted applications to the United States after 1911 to receive water from the government's Project supply. [Tracys Ex. 19, at 3639, 41, 46, 52, 79; Ex. 21, Abstract #96,198, at 37; Abstract #96,285, at 49, 56; Abstract #96,283, at 29, 31; Abstract #23,994, at 16, 18; Abstract #96,180, at 46, 88, 92; Abstract #96,205, at 48, 190, 194, 197, 200; Abstract #4821, at 55] They sold excess lands as required by reclamation law. [Tracys Ex. 21, Abstract #96,283, at 77; Abstract #96,285, at 89] All of these actions belay any argument by the Brantleys that they are entitled to individual "priority dates" different than those set forth in the Project Offer.

When CID's members' predecessors farmers signed up with the Pecos Water Users Association in 1905 committing to participate in the Project, they relinquished in signing their

stock subscription agreements any claims to priority dates, agreeing instead to receive a pro rata share of whatever Project water supply was developed. When these association members later signed individual contracts and applications for water supply from the Project with the federal government once it assumed the responsibility for building the Carlsbad Project, they waived any rights to claim individual priority dates or receive more than a pro rata share of the Project water supply.

The senior status of the Carlsbad Project water supply in terms of priority dates is at the Project level, and the priority dates of the Project as a whole is the District's, as well as its members' priority dates. There is no need, therefore, to put priority dates in the individual offers. Priority dates are for purposes of priority calls in years of shortage. If any of CID's members believe they have non-Project water rights with earlier priority than in the Project Offer, then they are certainly free in the membership phase to prove them up. But they are not Project water rights, as these rights are strictly construed by the applications CID's members' predecessors signed many years ago agreeing to be part of the Project. And the Court in this proceeding is only determining Project water rights.

The priority dates set forth in the Project Offer were taken from the Hope Decree. If any

of CID's members believe these dates are factually in error and that all or some part of the Project water rights purchased by the federal government from the old private ditch companies, as well as those appropriated and put to beneficial use within the Project, have an earlier priority date than those in the Project Offer, then they are of course free to raise and prove this in the Offer Phase of these proceedings. In this case, if the priority dates accepted in the Project Offer by the United States, the District, and the State are proven later to be factually in error by a member not bound by the Hope Decree, then the dates will change as to the entire Project. There can be no differing Project priority dates between CID's members. The Project's priority dates, instead, as a matter of state law must be applied as a whole to the entire Project water supply under the relation back and Mendenhall doctrines. These principals of state law, as well as federal reclamation law, are more thoroughly addressed in the United States' response to the Court's October 19, 2001 Decision and Order which CID, rather than repeating, adopts and incorporates by reference.

CID's Response at pp. 7-13.

State's Response:

In the State's Response counsel states:

> Although the State was not a party in either of those cases, (the Hope Decree (Pecos River) or the Judkins Decree (Black River)) and is not bound by those decrees, it agreed to the priority dates contained in those decrees for the purpose of making a stipulated offer of judgment and offers of judgment to individual CID members in these proceedings. As a party to the Stipulated Offer of Judgment and as a party to those offers that individual CID members have accepted, the State considers itself bound by the priority dates set forth in those documents. Counsel also noted that NMSA 1978 §§73-10-16 AND 73-10-24, pro rata apportionment of water to lands assessed by the irrigation district is required and that water is to be "distributed and apportioned by the district in accordance with acts of Congress and the Rules and Regulations of the Secretary of the Interior and the provisions" of the district's contract with the United States. NMSA 1978, §73-10-16.

State's Response at pp. 6-7.

PVACD's Response

In PVACD's Response counsel states:

> In previous briefs, CID has claimed that separate individual priority dates will result in highly complicated intra-district administration, with each tract of farmland having to be provided water based on the priority accorded

to each respective tract. On the other hand, upstream claimants are concerned that use of a single relation-back priority for the project will ignore the historical development of the district and inflate the water rights claims of many CID users to the detriment of upstream water users.

Application of relation back would be pernicious in these circumstances. Project priorities are incorrect and have nothing to do, logically, with member use rights. The appropriate test for member priorities is the date that water is devoted to a beneficial use by the claimant on a tract by tract basis.

II. Legal Discussion

The thesis of this brief is that the priority of the water right appurtenant to each individual tract of land in the project needs to be determined based on perfection by beneficial use. As priority is initially defined by diversion, and diversion leads to and is completed by beneficial use, and there is no legal priority without beneficial use, the priority and use doctrines are intrinsically related. And both concepts require tract-specific determination in New Mexico. CID can provide for intradistrict administration issues through contracts with its members, and can make appropriate intradistrict adjustments for those rights which may be dried up by priority administration of the stream system.

The leading case is from the Nambé-Tesuque-Pojoaque watershed. In *State ex rel. Reynolds v. Aamodt,* D.N.M. No. CIV 6639-M, Memorandum Opinion and Order (Feb. 26, 1987), Judge Mechem extensively treated this matter. *Id.* at 22-28. He ruled that a common priority cannot be adjudicated for rights under a ditch. "New Mexico law requires tract-by-tract priorities." *Id.* at 23. The reason: "Appropriators hold water rights individually based on satisfaction of the prerequisites for prior appropriation for their tract." *Id.* Thus Judge Mechem related beneficial use and priority as the two main determinations necessary to set prior appropriation rights for each specific tract.

As stated in *Snow v. Abalos,* "each [water user under a ditch] has a several right to take water from the stream system for the irrigation of his lands." *Id., citing Snow,* 18 N.M. 681,695, 140 P.2d 1044 (1914). In *Millheiser v. Long,* 10 N.M. 99, 61 P.2d 111 (1900), the Supreme Court "held that priority of application to beneficial use, not priority of diversion, determined water rights." Mechem Opinion at 24, quoting *Millheiser,* 10 N.M. at 104.

In order to comply with New Mexico adjudication law, it is necessary to determine "the relative rights of the parties, one toward the other." *State v. Shaw,* 66 N.M. 192, 196, 344

P.2d 943 (1959). In order to do that, specific priority determinations need to be made. *See also State v. Pecos Valley Artesian Conservancy District,* 99 N.M. 699, 700, 663 P.2d 358 (1983).

Other cases and authorities are supportive as well.

In *US v. Alpine Irrig. Dist.*, No. CIV. D-184-HDM (8/2/98), 1998 WL 808191 (Alpine IV), the federal district court in Nevada issued an opinion on forfeiture and abandonment. *Alpine* involved a federal reclamation project. The court held that project water users *could* have had the requisite intent to abandon a right they did not know existed until 1983. The court followed the Ninth Circuit's distinction in *Alpine III* between rights acquired by the US for the initiation of a project and the actual irrigation rights of the project, which were owned by the landowners and subject to state law forfeiture and abandonment standards.. That holding necessarily implies that irrigation rights must be determined tract by tract so that priorities can be set individually. *See also Department of Ecology v. Acquavella,* 1997 Wash. LEXIS 183, 135 Wash. 2d 746, 935 P.2d 595, 599 (1997) *(Acquavella III)* (similar reasoning); *Theodoratus,* 135 Wash. 2d at 590, 957 P.2d at 1245. *See* Kelley, *Staging a Comeback-- Section 8 of the Reclamation Act,* 18 U.C. Davis 97, 17174(1984).

Throughout the last century, courts in New Mexico and other jurisdictions as well as the leading Reclamation Law commentator have all upheld the individualized determination of beneficial use, the significant interposition of beneficial use and priority, and the determination of priority tract by tract. Determination of priority must be made tract by tract so the beneficial use carrying the priority can be set, Under New Mexico law, the most authoritative approach, and the better one, is that water right priorities, in a New Mexico irrigation district as outside it, should be determined tract by tract.

Assume that priorities in an irrigation district like CID were determined tract by tract, that is, individually. If some relatively junior rights in the district were curtailed through a priority call, the remaining rights in the district could be served by pro rata distribution to those remaining rights, after the curtailed rights were shut off.

When priority administration is not imminent, the situation is somewhat similar. Different tract by tract priorities can be adjudicated throughout a particular project. At the same time, pursuant to state statutes, intra-district distribution of water can be made on a *pro rata* basis, as is the custom at CID. The pro rata distribution does not conflict with the individualized priorities. The members of the

district have no occasion to contest priorities among themselves in the normal course of things. Instead, state law on intradistrict regulation controls.

Returning to the priority call, CID relations with upstream users require a different approach. Here the adjudication of water rights on each tract of the project become important, because (first) rights determined to be junior to upstream rights cannot call on them, and (second) the priority, magnitude, beneficial use and other characteristics of the remaining senior rights is necessary for enforcement, and can only be properly determined tract by tract.

Priorities of storage at some CID reservoirs should be carefully evaluated, in light of factors such as reasonable time and due diligence. Ft. Sumner, for example, should have a date-of-construction priority, about 1937. Santa Rosa's priority would be about 1987. Evaporation at any of the reservoirs, including Brantley, caused by additional lake surface due to enlargement or transfers from smaller facilities should have a late priority. This is a significant issue, deserving of development at trial.

Another matter dealing with beneficial use but also relating to priority could be of importance to the Court. Supplemental wells should not be allowed to increase CID's demand

from the Pecos. These wells are not in priority, do not meet the tests for Templeton Doctrine rights, and do not have relation back status. In increasing the early priority rights, the wells create an inflated demand based on a spurious seniority that depletes flows to Texas and harms other users. This also should be a trial issue.

III. Conclusion

For the foregoing reasons, CID member priority dates should be determined tract by tract. Other subsidiary matters should be dealt with as suggested above.

PVACD's Response at pp. 2-5.

The Brantleys Response

Counsel for the Brantleys states:

A. Cases Establishing Right of Individual CID Members to Claim an Individual Priority Date Prior to Priority date for the CID

At page 16, the Court has indicated the following:

> **A subsidiary issue arises as to whether members of CID waived or relinquished the right to claim an individual priority date prior to the priority date determined for the Project.**

It would seem that all of these issues would have been addressed by courts on numerous prior occasions and that there would be an abundance of pertinent legal authority that would be useful in determining these issues.

Brantleys have thoroughly searched for and reviewed documents regarding the priority issue. There is no document that has any CID member waiving or relinquishing that member's individual right to a priority date prior to the priority date of the Project. In fact, there exists an Eddy County District Court decision that establishes the right of an individual CID member to obtain a priority date prior to any proposed priority date prior to the Project. **In State of New Mexico, on the relation of S. E. Reynolds, State Engineer, vs. Carlsbad Irrigation District and Catherine Guitar Woods, Eddy County District Cause cause No. 23,395,** Judge Caswell S. Neal held that Catherine Guitar Woods was entitled to divert 100-acre fee (sic) of water per annum from Black River on certain lands specified in the Judgment. The 100-acre feet was over and above the 2,800 acre-feet of water per annum that the Carlsbad Irrigation District was entitled divert from Black River. Catherine Guitar Woods,

an individual CID member, was determined to have a priority date of June 22, 1885, for the 100-acre feet water right. *(A certified copy of the Eddy County District Court Judgment is attached to this Response as Exhibit "A.")* Thus, there does exist a court decision that recognizes an individual CID member is not bound to a Project priority date and is entitled to not only a priority date prior to any of the proposed dates for the Project but also, if the individual member can establish the right, a right to divert water in excess of the CID's allotted right of diversion.

It is also important to note that in Eddy County Cause No. 23,395 both the State of New Mexico and the CID were parties to the suit. Because of the issues tried and determined in that case, neither the State of New Mexico nor the CID can now challenge the right of an individual member of the CID to have a water right adjudicated with a priority date that is prior to any of the proposed priority dates for the Project. Whether one characterizes the bar as defensive or offensive collateral estoppel, the doctrine is applicable on this issue. The doctrine of defensive collateral estoppel may be applied when a defendant seeks to preclude a plaintiff from relitigating an issue the plaintiff has previously litigated and lost regardless of whether defendant was privy to the prior suit; and that the doctrine of

offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully regardless of whether plaintiff was privy to the prior action. Reeves v. Wimberly, 107 N.M. 231, 234, 755 P.2d 75, 78 (Ct. App. 19885}; State v. Silva, 106 N.M. 472, 476, 745 P.2d 380-384 (1987)

Livingston v. Neeson, et. al., Eddy Co., Dist. Ct. Cause No. 5,144 also establishes the right to have a priority date prior to any proposed priority date for the Project. In that case, Valley Land Company, whose land, some of which was within the CID, was adjudicated to have right of March 26, 1883. The point of diversion for Valley Land Company was the original Island Crossing Ditch Company ditch which was located in Section 11, Twp. 23, Rge 28 E. Lincoln County (now Eddy Co.) which is now in the CID. *(See discussion of Livingston v. Neeson in Brantleys' prior Brief)*

Therefore, there are two Eddy County District Court cases which establish the right of an individual to obtain a priority date prior to any priority date proposed for the CID. This is exactly what the Brantleys have consistently asserted throughout this litigation.

B. Issue of Approaches to Determination of Priority Dates

1. Project priority Dates:

This Court has also asked for commentary or response regarding the issue of determination of priority dates in different contexts. The Court has suggested that a priority date(s) in connection with the diversion and storage of Project water by the United States be determined. That date has already been determined. In the Hope Decree, the United States District Court found the Project to have an 1889 priority date at Avalon Dam for 7,000 acre feet for fill and re-fill. The Hope Decree also establishes a priority date of 1893 at McMillan dam for 90,000 acre feet for fill and re-fill. The Project Offer only gives 45,000 acre feet at Brantley. The Project offer is contrary to the Hope Decree's specific adjudication regarding priority dates for the United States at the Project's point of diversion as well as the volume

of water.

The Ft. Sumner and Santa Rosa storage dates were determined in the Hope Decree by reference to the United States's filing with the Territorial Engineer on February 2, 1906 for the right to divert, impound, store and utilize water within the Carlsbad Project for 300,000 acre feet per annum pursuant to the 1905 Water Code, §22 of Chapter 102, Sessions Law of 1905. *(A copy of the relevant portion of the Hope Decree is attached to this Response and Commentary as Exhibit "B").*[16]

2. *Individual Member Priority Dates:*

Brantleys do not disagree

---

[5] In its ***Response Brief to Matters Set Forth in the Court's March 20, 2001 Decision and Order and April 5, 2001 Order,*** the CID argued the Hope Decree made a finding that all of the Project's water rights related back to the 1906 priority date as set by the United States' 1906 notice under state law.

that the Project should have its own project priority date. Brantleys do not object to the Project priority date appearing in member subfiles. However, the members are still entitled to their own individual priority date based upon the water right they own, when it was acquired and its history of being put to beneficial use. The relation back doctrine is also applicable to determination of the individual member's priority dates. The Project should have a priority date of February 2, 1906, which is the date the United States filed notice with the New Mexico Territorial Engineer. This was the first act by the United States following purchase from the Pecos Irrigation Company. Prior to the United States purchase from the Pecos Irrigation District, the water rights were held by individual stockholders and each had their own separate priority date. Therefore, it is also appropriate for each individual CID member to have their own individual priority date based

upon the criteria Brantleys have previously set forth in their August, 2001 brief regarding priority dates.

Brantleys' Response at pp. 2-4.

The Tracy/Eddys Response

Counsel for the Tracy/Eddys State:

The Court requested in it's Order of October 19, 2001, that the parties set forth their positions concerning priority dates and whether individual water right owners could have a priority date earlier than the project priority date of the Carlsbad Irrigation District.

Insofar as the Eddys and Tracys interests are concerned it is clear that they or their predecessors in title began applying water to beneficial use many years prior to the formation of the Carlsbad Irrigation District. In fact, their water rights may date from 1883 when the first water was put to beneficial use from the Halagueno ditch, even before the Pecos Irrigation and Improvement Company. Of course, most, if not all of the project was being watered by the time of the March 19, 1932, contract with Carlsbad Irrigation District.

The water rights vested with the owner once the water was applied to beneficial use upon the property and as this Court has stated once those water rights were vested by the application of the water to beneficial use then that priority would continue in force and effect unless waived or relinquished. Section 72-1-2 (NMSA 1978 Comp.) This Court has clearly held in Threshold Legal Issue No. 3 that the beneficial users within a federal irrigation project are the owners of those water rights and ownership and use of the water rights shall be subject to New Mexico Law. The storage and diversion rights of the United States are not owned as a property right by the United States and therefore cannot be property of the United States. It should be pointed out that the CID's position that preferential status was given to irrigation districts such as CID formed in cooperation with the United States under Federal Reclamation Law is just in error and a mischaracterization of New Mexico's obligation to consent to certain federal standards.

Given the fact that this Court has made it's determination that the Law of the State of New Mexico should apply in these instances, then Statutory requirements that once beneficial use of water is commenced on a given property then the priority date of that use relates back to the initiation of the claim

for rights prior to March 19, 1907, pursuant to Section 72-1-2 (NMSA 1978 Comp.). Section 8 of the Reclamation Act of 1902 represents a decision by Congress to require reclamation to obtain water rights under the requirement of State Law rather than relying on the Federal Constitutional power. In fact, in 1906 the United States filed a letter with the Eddy County Clerk's office that they had acquired the rights of the Pecos Irrigation Company and would use those rights for the Project. (See attached Exhibit "A" and "B", which is a re-typed copy for the Court's convenience.)

Since many of the individual appropriators were applying their water rights to beneficial use prior to 1906, when there was Federal acquisition of this project, those rights were vested under State Law prior to that acquisition and unless they have been relinquished or waived, those water rights were vested with the priority dates before 1906.

The contracts between the United States and members of the Pecos Water Users Association and the contract with the Carlsbad Irrigation District did not constitute a waiver or relinquishment of any vested private right of water rights to that water. The United States has never attempted to void any State acquired water rights until now and the Court has already disposed of that issue.

Therefore, the proof to be used in the Project Offer phase of this hearing, which will establish the time and amount of beneficial use of water on the land will relate back to the initiation of the claim and will establish the priority date which the individual land owners will have.

Having said the above however, it is clear that pursuant to the contract of 1932 the water to be used in the project must be applied pro-rata to the project, even if certain members have priority dates earlier than others.

Owning an earlier priority date would have some effect if an owner of a very early priority date water right were to dispose of the water right outside the confines of the Carlsbad Irrigation District, but that issue is not before this Court.

Therefore, the Tracys and Eddys respectfully submit to this Court that the priority dates of each individual owner of the water rights in the Carlsbad Irrigation District will be determined by the date in time as established by the evidence in the Project Offer phase and their priority date will be established at that time. The proof to be presented in the Offer phase will be the original filings by the Companies, the United States and the proof of their continued use. As

> to the Tracys and Eddys that date will relate back to 1883, assuming the proof is established in the Project Offer phase that such water was applied to beneficial use.

Tracy/Eddy Response at pp. 1-4.

Court's Decisions and Orders

Issues and controversies concerning the appropriate priority dates for storage and diversion of Project water will be determined in the Project (Offer) Phase of these proceedings.

NMSA 1978, §72-4-19 provides in pertinent part:

> Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

Under this statute, it is mandatory that a priority date for water rights of individual members of CID be determined. Also, under the statute, "...the specific tracts of

land to which it shall be appurtenant," shall be determined.

Issues and controversies remain as to whether Project priority dates should be included in subfile orders of individual members of CID or whether individual priority dates based upon when water was devoted to beneficial use or on a relation back basis must be determined. NMSA 1978, §72-4-19, and Judge Mechem's 1987 Opinion in *Aamodt* concerning tract by tract determinations have not been discussed by counsel other than counsel for PVACD in connection with the 1987 Opinion. Counsel are granted leave for a period of thirty (30) days after the date of service of this opinion and order to respond to the claims of PVACD that New Mexico law requires an individual tract by tract determination of priorities in these proceedings which shall include a memorandum brief concerning the proper interpretation of NMSA 1978, §72-4-19.

The Court agrees with the arguments of the United

States that NMSA 1978, §§73-10-16 and 73-10-24 concerning the pro rata distribution of water to members of CID are controlling; however, this does not answer the question of whether members of CID are entitled to have individual priority dates determined with the specific understanding that Project water *vis a vis* members of CID is to be distributed equitably and on a pro rata basis.

CID claims that when members of CID

> ...signed up with Pecos Water Users Association in 1905 committing to participate in the Project, they relinquished in signing their stock subscription agreements any claims to priority dates, agreeing instead to receive a pro rata share of whatever Project water supply was developed. When these association members later signed individual contracts and applications for water supply from the Project with the federal government once it assumed the responsibility for building the Carlsbad Project , they waived any rights to claim individual priority dates or receive more than a pro rata share of the Project water supply.

CID's Response at p. 12. Diametrically opposed to CID's

position, counsel for the Tracy/Eddys state:

> The contracts between the United States and members of the Pecos Water Users Association and the contract with the Carlsbad Irrigation District did not constitute a waiver or relinquishment of any vested private right of water rights to that water. The United States has never attempted to void any State acquired water rights until now and the Court has already disposed of that issue.

Tracy/Eddys' Response at p. 3. Authorities in support of the respective contentions of the parties as to relinquishment or waiver have not been submitted to the Court. All parties are granted leave to submit a memorandum brief concerning the issues of relinquishment or waiver within thirty (30) days after the date of service of this opinion and order.

The Court has previously stated:

> It is difficult to perceive when a member would be permitted to assert a priority date prior to a Project priority date, but the right, if established, and once vested, and, (sic) would seem to continue in force and effect unless waived or relinquished.

Court's Decision at p. 17. The Court is of the opinion that individual priority dates should be determined based upon the date that water is devoted to beneficial use or on a relation back basis, but, with the specific understanding that the distribution of water among members of CID shall be made pro rata at all times in accordance with the provisions of NMSA 1978, §§73-10-16 AND 73-10-24 with due regard to NMSA 1978, §72-5-28 F.

III. ADDITIONAL COMMENTS, SUGGESTIONS AND OBJECTIONS TO THE COURT'S DECISION

In the State's Response, counsel requests clarification of the Court's decision re Issue No. 4 which provides:

> *Are the water rights of members of CID subject to forfeiture or abandonment and if so, under what facts and circumstances?*

Counsel states:

> The State agrees with the Court's holding insofar as it would apply to water rights that are actually owned by the United States or to property rights in irrigation works themselves.

> In this case, however, the United States does not have a property right in the water rights owned by the individual members of the CID. Its right under federal reclamation law and state law to divert and store water to serve the Carlsbad Irrigation Project is neither the type of right that was at issue in *Ballard* nor the type of right that is entitled to the protection of the Property Clause. The State therefore respectfully requests this Court to expand its ruling to make it clear that, although water rights owned by the United States may not be lost through laches or the neglect of its officers and employees, the amount of water that the United States may divert and store, and the CID may distribute, in connection with the Carlsbad Project will be based upon the amount necessary to serve the adjudicated rights of the CID's individual members.

State's Response at p. 4.

Court's Decision

Counsel for the States' request is granted. The Court determines that the amount of water that the United States may divert and store and that CID may distribute in connection with the Carlsbad Project will be based upon the amount necessary to serve the adjudicated rights of CID's

individual members.

The United States' Comments Re Pro Rata Distribution of Water

Counsel states:

> The United States comments that the recognition by the Court that the diversion and storage rights of the United States and the distribution rights of CID are applicable to the entire Carlsbad Project is vital to the protection of the long term viability of the Project. *See* October 19, 2001 Decision at 6.
>
> ***
>
> However, as is discussed more fully below, state law is clear that the Project water is distributed *pro rata* to the CID members all of the time, not just in times of shortage. NMSA 1978, §73-10-16. United States' Comments, p. 2.

Court's Decision

The Court concurs that Project water is to be distributed *pro rata* to CID members all the time, not just in times of shortage. The Court did not intend to rule otherwise.

PVACD's Comments Re NMSA 1978, §§72-9-4 and 72-5-33

PVACD submits that NMSA 1978, §72-9-4 "should be given a restrictive interpretation so that it does not apply to the situation at all and leaves the jurisdiction and authority of the State Engineer otherwise intact." PVACD's Comments at p. 1. PVACD, refers to its consolidated Reply Brief on Threshold Legal Issue No. 3, at 7 and 10, states that §§72-9-4 and 72-5-33 should be applied *in pari materia*, that the legislature did not intend to grant a permanent, broad based exemption to the Bureau of Reclamation from State law and then states:

> The most reasonable reading of these two laws, considered together, is that they exempt reclamation projects from state laws in regard to Bureau projects involving construction of works....". The only reported New Mexico cases interpreting §72-9-4 is *City of Raton v. Vermejo Conservancy Dist.*, 101 NM 95, 678 P.2d 1170 (1984). ...*City of Raton* is quite consistent with the construction of state law

suggested here.

In addition to the statutory construction quoted above the named brief, PVACD analyzed *City of Raton* to show that it, when interpreted correctly, led to the same conclusion already posited by the *pari materia rule.* In addition to that, PVACD relied on a memo from the Chief Counsel of the State Engineer Office, Paul Bloom, to his boss Steve Reynolds, elucidating the very same position as the State Engineer policy on such matters, and showing the firm administrative construction of the statute. *See Reply Brief, supra.*

The correct legal construction of §72-9-4 is that it applies to Bureau building and rehabilitation projects, not to all reclamation projects throughout time. It doe not apply when construction is not in progress, and normal state beneficial use standards do apply. Thus we suggest that when the Court considers how to construe the law, the appropriate construction is that the law simply does not apply here at all. PVACD's Comments at p. 2.

Court's Decision and Order

The Court will consider PVACD's comments in connection with required determinations of issues which may

be hereafter submitted to the Court from time to time in the context of specific factual situations. See Court's Decision at p. 9.

CID Comments Re Beneficial Use

CID suggests that the Court add to the language in its decision concerning beneficial use that it be

> ...quantified and based upon the District's historical diversion, distribution, and delivery of and its members' Project water. It is CID's understanding that the Court has not yet ruled whether the historical beneficial use was already determined and quantified in the Pecos River Compact. CID will also present evidence in the Offer Phase that shows historical irrigation of 25, 055 acres. CID's Response at p. 2.

Court's Decision and Order

CID's request is denied; however, the Court has not yet ruled whether historical beneficial use has been determined in the Pecos River Compact and whether the determination is binding in these proceedings.

Counsel for CID then states that CID :

...has argued that historical beneficial use is what its assessment rolls already identify. CID agrees with the Court's ruling in this section of its Decision and Order that the United States' diversion and storage rights and the District's distribution rights in the Project are applicable to the entire Carlsbad Project and can not be broken down, quantified, or decreed at the member level.

The only other comment Defendant Carlsbad Irrigation District has with the remainder of this section of the Court's rulings on beneficial use is an objection to the formula set forth in the last paragraph of the Court's Decision found on Page 6. In this paragraph the Court creates a formula to be used for purposes of defining the "pro rata" basis upon which Project water is to be distributed to CID's members under NMSA 1978, §73-10-16 (1919). However, because the District's members are allowed to stack their historic beneficial use of Project water on any portion of their assessed acreage (state water law allows such actions without penalty or forfeiture), this formula would be unworkable. For example, Farmer A may have 30 acre feet of Project water supply which he originally applied to beneficial use on 10 acres of land, but which is now being applied to only 5 of those acres because he

has put in a pecan orchard. Farmer B, on the other hand, may have 30 acre feet of Project water supply which he historically applied to beneficial use on 10 acres and which is still being used on the original 10 acres.

Under the Court's formula in its Decision and Order, "pro rata" share under Section 73-10-16 is to be determined based upon a quantity of acreage, not upon the quantity of water historically put to beneficial use. The acreage upon which the Project member applies Project water may change, even from year to year. But the quantity of the member's water supply does not change. Therefore, any formula to determine an individual member's "pro rata" share cannot be based on acreage alone as the quantifying measure.

The adjudication statute under NMSA 1978, §72-4-19 (1907) authorizes the Court in its decree to declare, as to water used for irrigation, the specific tracts of land to which the use may be appurtenant. In Farmer A's case above, his stacked 30 acre feet of historical beneficial use may be decreed to be "appurtenant" to only the 5 acres, but for Farmer B it would be to 10 acres. Using the Court's formula, it appears Farmer A would receive only half of his pro rata share since it was based on quantity of acreage rather than quantity of water historically put to beneficial

use, although both farmers historically applied to beneficial use the same amount of water.

The Court's formula also appears not to take into account that the amount of water supply that can be delivered "pro rata" (i.e. equally) to the "field" of each member is effected by evaporation and seepage losses along the way. It may also require push water. If the District were to determine in a given year that 10,000 acre feet of additional water is available in storage to be released and delivered"pro rata" to its members, multiplying the amount of 10,000 acre feet by the fraction in the Court's Decision would not take into account that the water needed to get Farmer A's "pro rata" share to his field at the top of the delivery system may be significantly less than the water supply necessary to get Farmer B's "pro rata" share of water to his field at the end of the distribution system. Furthermore, as commented by the United States in its Comments, Suggestions, and Objections to the Court's October 19, 2001, Decision and Order and Brief on Priority Dates, under state law the Project's water supply under Section 73-10-16 is to be distributed pro rata to CID's members all the time, not just in times of shortage.

CID's Response at pp. 2-4.

Court's Decision

Beneficial use of water shall be quantified with due regard to evaporation and seepage losses.

Water shall be distributed by CID to its members on a pro rata basis as provided in NMSA 1978, §73-10-16 with due regard to NMSA 1978, §73-10-24 and the right of members to apply the full amount of water covered by or included in their individual water rights or permits to any part of the designated or specified tract in accordance with and subject to the provisions of NMSA 1978, §72-5-28 F.

CID continues:

B. Issue No. 2 (Page 7 of Court's Decision)

> Defendant Carlsbad Irrigation District's comments and suggests in this section that the Court's language referring to the water rights of members of CID as being quantified "on the basis of the amount of water which is devoted to beneficial use by each member" be amended to read "on the basis of the amount of water which *historically applied* to beneficial use by each member." Carlsbad Irrigation District believes that its members are legally entitled

> to prove up their individual Project water rights as identified on the District's assessment rolls on the basis of historical beneficial use, not the restricted "one point in time" snapshot used by the State Engineer in the State's hydrographic survey.

CID's Response at p. 4.

Court's Decision

CID's concerns may be addressed in connection with quantification of beneficial use but not necessarily by use of the phrases "historically applied". CID's request is denied.

Counsel for CID continues:

> **C. Issue No. 3 (Pages 7-11 of Court's Decision)**
>
> In this section of the October 19, 2001 Decision and Order, the Court agrees that CID's Board has the authority, either upon its own motion or that of a member, to suspend and transfer Project water under Sections 73-13-4 et seq. without being subject to the State Engineer's jurisdiction. It is within the Board's discretion to determine which of the District's lands are irrigable and suitable for irrigation and are to receive Project water. Carlsbad Irrigation District agrees with the Court's interpretation of Section 72-9-4 that it does

not change the concept that beneficial use will be the basis and measure of CID's members' water rights, as well as the United States' diversion and storage rights and CID's distribution rights. It is CID's understanding that the Court has ruled in this section of its Decision that the District and its members are exempt under Section 73-13-4 from the State Engineer's administrative authority not only for suspensions and transfers, but also for any incidental matters involved in these transfers such as changes of use and points of diversion. The Court declined at this time to address the broader exemption language in Section 72-9-4, finding at least as to Project transfers, that the more specific language in Sections 73-13-4 et seq. granting the District such transfer powers is controlling.

CID's Response at pp. 4-5.

Court's Decision

The Court has ruled upon the matters referred to in counsel's comments. No further determinations of the Court are required.

Counsel for CID continues:

D. Issue No. 4 (Page 12 of Court's Decision)

In this part of its Decision, the Court ruled that the water rights of CID's members can be forfeited under the provisions found in Section 75-5-28, but that the right to use water of the United States may not be lost through laches or neglect of its officers or employees. The Court, however, does not decide what happens to a member's water right if it were forfeited. Carlsbad Irrigation District would ask the Court for clarification on this issue as it is imperative that the Court recognize that any "forfeited" water rights of a CID member would not thereby become "unappropriated water" subject to the State Engineer's permit authority. The water remains Project water and would be subject to the District's suspension and transfer process.

The Court concludes this part of its Decision by stating that the issues and controversies surrounding the 25,055 Project acreage figure will be determined in the Project (Offer) Phase of these proceedings. It is CID's understanding that the parties will be allowed to fully address these matters at that point, including the District's position that the Pecos River Compact's determination of 25,055 acres of historical beneficial use within the Project is not only an evidentiary finding binding on the State, but is also a matter which this Court lacks jurisdiction to alter.

CID's Response at pp. 5-6.

Court's Decision

What happens to a member's water rights if they are forfeited appears to raise a new issue to which other parties have not had an opportunity to respond. The issue will be determined based upon the submission of memorandum briefs which shall be submitted to the Court within thirty (30) days after the date of service of this Supplemental Decision and Order

NMSU's Objections to Court's Determinations re Forfeiture and Abandonment Examined in Connection with Issue No. 4.

Counsel for NMSU claims that statutory forfeiture as provided in NMSA 1978, §72-5-28 should not apply to water rights appurtenant to project water acreage because NMSA 1978, §72-9-4 exempts federal reclamation projects from statutory forfeiture and

> through the practice of "suspension and transfer" in CID, as well as the payments of assessments on lands no longer being irrigated for a variety of reasons (e.g. building a barn on property which was previously irrigated) a

> water user is likely to be showing an intent to not abandon a right.... the issue of abandonment of a water rights should be viewed differently within an irrigation district. Although arguably these practices fail to meet the criterion set forth in *South Springs* and its progeny to show an intent to abandon, the Court's holding does not conclusively recognize that these practices work to avoid abandonment.
>
> In it *Brief on Quantification and Allocation Issues,* NMSU argued the total quantity of water rights within CID is the sum of water rights vested by beneficial use on all irrigated acreage within CID and once vested, such rights are generally protected from termination. We would respectfully request that the Court reconsider its decision on forfeiture and abandonment in order to insulate the individual landowners in CID from claims of forfeiture and abandonment.

NMSU's Comments at p. 2.

Court's Decision

The Court has previously ruled in regard to the claims of NMSU in connection with the proper interpretation of NMSA 1978, §72-9-4.

The remainder of NMSU's requests are denied.

IT IS THEREFORE ORDERED that:

1. All parties are granted leave to submit memorandum briefs concerning the matters specified at pages 13, 28, 29, and 36 of this Supplemental Decision and Order within thirty (30) days after service of this Supplemental Decision and Order.

2. All parties are granted leave to submit objections, comments and suggestions to the form or content of this Supplemental Decision and Order within thirty (30) days after service hereof.

3. The parties shall prepare requested ultimate findings of fact and conclusions of law concerning the issues involved in this phases of these proceedings and suggested matters to be included in offers to members of CID and subfile orders to be entered in connection with the determination of the water rights claims of members of CID

with forty (45) days after the service date of this Supplemental Decision and Order. Requested findings of fact shall include page references to exhibits relied upon in support of each tendered findings of fact. Authorities shall be cited in connection with each requested conclusions of law .

4. Within thirty (30) days after the effective date of service of the parties requested findings of fact and conclusions of law, counsel for the State shall prepare a proposed order as provided in paragraph 6, p. 21 of the Court's March 20, 2001 Decision and Order and paragraph 5, page 20 of the Court's Decision, circulate it for approval or objections as to form or content by all other counsel and interested parties appearing *pro se*, and then submit it to the Court for review, approval and entry in the Membership Phase of these proceedings.

5. Counsel are requested to advise the Court

forthwith of the status of their settlement negotiations.

6. Counsel for the State is requested to serve a copy of this Supplemental Decision and Order upon all counsel and parties appearing *pro se* in this phase of these proceedings other than those set forth on attached Exhibit A.

/s/_____
HARL D. BYRD
DISTRICT JUDGE *PRO TEMPORE*